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Recent Cases

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RECENT CASES

AGENCY—REPRESENTATIONS—LIABILITY OF PRINCIPAL FOR AGENT'S ASSAULT WHERE CONSENT OBTAINED BY FRAUD

Plaintiffs, a mother and daughter applying for life insurance, were called upon by defendant insurance company's agent, who as a "field underwriter" possessed the original application forms[1] and was authorized to question applicants to determine whether they were insurable risks. The agent fraudulently posed as a physician in order to make an intimate physical examination of the two women,[2] and subsequently plaintiffs sued the insurance company for the alleged assault by the agent. The trial resulted in a verdict for defendant, the jury being instructed that at the time of his conduct the agent must be acting, at least in part, for the benefit of his employer. On appeal, *held,* reversed. When an agent practices deception in obtaining the consent of third persons to an offensive bodily touching, the principal is liable for the resulting intentional tort if it has placed the agent in a position to perpetrate the fraud while acting within his apparent authority. *Bowman v. Home Life Ins. Co.,* 243 F.2d 331 (3d Cir. 1957).

It is now uniformly held that a principal is responsible for the fraudulent acts[3] or misrepresentations[4] of his agent committed within the agent's actual or apparent[5] authority. It is equally well settled that

1. These forms were the evidence of the agent's authority, and were to be used by the agent to record the applicants' medical history along with other pertinent data.

2. To add credibility to this ribald scheme the agent brought along a black bag that looked like a physician's kit. There was also evidence that he performed similar "examinations" on several other female applicants. His employer obviously did not appreciate his ingenuity as he was fired soon after the discovery of these escapades.

3. Stillson v. Prudential Ins. Co., 202 Ga. 79, 42 S.E.2d 121 (1947); Yoars v. New Orleans Linen Supply Co., 185 So. 525 (La. App. 1939); New England Mut. Life Ins. Co. v. Swain, 100 Md. 558, 60 Atl. 469 (1905); Engen v. Merchants' & Manufacturers' State Bank, 164 Minn. 293, 204 N.W. 963 (1925); McKinnon v. Vollmar, 75 Wis. 82, 43 N.W. 800 (1889). See 2 MECHEM, AGENCY § 1984 (2d ed. 1914).

4. Rutherford v. Rideout Bank, 11 Cal. 2d 479, 80 P.2d 978 (1938). This is true even though the agent acts entirely for his own purposes. See RESTATEMENT, AGENCY §§ 261, 262 (1933).

5. Spann v. Commercial Standard Ins. Co., 82 F.2d 593 (8th Cir. 1936). "The doctrine of apparent authority has been rationalized almost universally by the theory of estoppel in pais. . . . The elements necessary to create the estoppel are (a) act . . . of the principal creating an appearance of authority in the agent; (b) actual reliance by a third party upon the appearance so created; (c) reasonableness of this reliance; (d) consequent detriment to the third party." 55 MICH. L. REV. 447-48 (1957). See RESTATEMENT, AGENCY § 8 (1933).

fraud by the agent outside the scope of such authority attaches no liability to the principal.[6] Normally this responsibility is limited to actions arising out of a contract relationship,[7] including tort actions for misrepresentation[8] as well as the usual contractual actions.[9] The principal's liability is imposed even though the agent acts entirely for his own purposes, and not in furtherance of his business.[10] It is also well settled that a master is responsible for the torts of his servant committed within the scope of his employment,[11] and here it is usually essential that the servant's act be in furtherance of his master's business.[12] Willful torts, by their very nature, are, in most cases, outside the servant's scope of employment;[13] but there is a growing tendency to hold the master liable for the servant's willful torts in cases in which the use of force is a normal function of the employment[14] or in which the servant uses wrongful means to promote his employer's business.[15] The fact that the servant has been placed in a position to commit a tort is a fact that must be considered,[16] but

6. Crawford v. Boston Store Mercantile Co., 67 Mo. App. 39 (1896); Farmers' State Guaranty Bank v. Cromwell, 70 Okla. 199, 173 Pac. 826 (1918).

7. MECHEM, OUTLINES OF AGENCY § 131 (4th ed. 1952); Note, 45 HARV. L. REV. 342 (1931). Some courts have held that a contractual relationship is requisite to liability. Hannon v. Siegel-Cooper Co., 167 N.Y. 244, 60 N.E. 597 (1901), 47 HARV. L. REV. 344 (1933).

8. Haskell v. Starbird, 152 Mass. 117, 142 N.E. 695 (1890).

9. "Where the representation is made as part of the contract, rather than as a mere inducement to it, any appropriate contractual remedy may be had . . . ." 2 MECHEM, AGENCY § 1994 (2d ed. 1914). This includes the equitable relief of rescission: Ellison v. Stockton, 185 Iowa 979, 170 N.W. 435 (1919); United Bankers Mut. Life Ins. Co. v. Clemons, 232 S.W.2d 622 (Tex. Civ. App. 1950).

10. Standard Surety & Cas. Co. v. Plantsville Nat'l Bank, 158 F.2d 422 (2d Cir. 1946); Duarte v. Postal Union Life Ins. Co., 75 Cal. App. 2d 557, 171 P.2d 574 (1946); RESTATEMENT, AGENCY § 262 (1933).

11. For a collection of cases dealing with civil liability of the master for his servant's assault upon a female, See Annot., 6 A.L.R. 985, 1007 (1920). For elements of "scope of employment," see RESTATEMENT, AGENCY § 228 (1933).

12. Hardeman v. Williams, 150 Ala. 415, 43 So. 726 (1907); Barney v. Jewel Tea Co., 104 Utah 292, 139 P.2d 878 (1943); RESTATEMENT, AGENCY § 235 (1933). However, in some instances strict liability is imposed without regard for the scope of employment question. See, *e.g.*, where there is a special duty owed: Pine Bluff & A.R. Ry. v. Washington, 116 Ark. 179, 172 S.W. 872 (1915); Garvik v. Burlington, C.R.&N. Ry., 131 Iowa 415, 108 N.W. 327 (1906), (both cases involving railroads); Mayo Hotel Co. v. Danciger, 143 Okla. 196, 288 Pac. 309 (1930), (innkeeper). Where there is a dangerous instrumentality involved: Pittsburgh, C.&St.L. Ry. v. Shields, 47 Ohio St. 387, 24 N.E. 658 (1890). See Horack, *The Dangerous Instrument Doctrine*, 26 YALE L.J. 224 (1916). Where bills of lading are fraudulently issued: Gleason v. Seaboard Air Line Ry., 278 U.S. 349 (1929). However, here it is possible to find liability on agency principles, see Ferson, *Fraudulent Bills of Lading*, 21 MICH. L. REV. 655 (1923).

13. See 2 MECHEM, AGENCY §§ 1926-30 (2d ed. 1914); MECHEM, OUTLINES OF AGENCY § 394 (4th ed. 1952).

14. Orr v. William J. Burns International Detective Agency, 337 Pa. 587, 12 A.2d 25 (1940).

15. Empire Clothing Co. v. Hammons, 17 Ala. App. 60, 81 So. 838 (1919); Singer Sewing Mach. Co. v. Stockton, 171 Miss. 209, 157 So. 366 (1934).

16. Grimes v. B. F. Saul Co., 47 F.2d 409 (D.C. Cir. 1931) (master not liable for assault by his building inspector because this was not a part of the task

courts have generally concluded their analyses with a determination of the scope of employment question.[17] Previous cases involving indecent assault by an agent or servant have been decided upon this basis.[18]

In a few cases where the wrongdoer himself was being sued for a tortious touching where consent was vitiated by fraud, recovery has been allowed on the basis of misrepresentation.[19] However, when the question is the liability of a principal for such conduct of his agent, a court applying the orthodox approach of master-servant would probably rule that such an act was a departure from the scope of employment and thus impose no liability upon the master.[20] In the instant case, the lower court emphasized the need for the employee to be acting in furtherance of defendant's business.[21] However, the appellate court, in dealing with an unusual fact situation,[22] adopted a rather unorthodox approach. Though the plaintiffs' action was assault for a tortious touching in which fraud vitiated the consent, the court took the position that the real wrong here was the deception and that the case should be treated as one of misrepresentation. This is the approach usually taken in an action of deceit, but the court stated that the distinction as to injuries was not important.[23] Thus, it was held that the jury should not have been instructed that the agent must be acting, at least in part, in furtherance of his principal's business. The court bases its decision primarily on the theory that the defendant has placed the agent in a position[24] in which the latter was able to

assigned to him); Stone v. William M. Eisen Co., 219 N.Y. 205, 114 N.E. 44 (1916) (master held liable where employee who was directed to fit woman's brace committed indecent assault, because master had put employee in position for this to happen).

17. Grimes v. B. F. Saul Co., *supra* note 16; Anderson v. Metropolitan Life Ins. Co., 128 Misc. 144, 218 N.Y.S. 494 (Sup. Ct. 1926); Life & Cas. Ins. Co. v. Russell, 164 Tenn. 586, 51 S.W.2d 491 (1932).

18. Singer Sewing Mach. Co. v. Stockton, 171 Miss. 209, 157 So. 366 (1934), (master held liable); Rohrmoser v. Household Finance Corp., 231 Mo. App. 1188, 86 S.W.2d 103 (1935) (master not liable because acts of servant were outside scope of employment).

19. Blossom v. Barrett, 37 N.Y. 434 (1868); De Vall v. Strunk, 96 S.W.2d 245 (Tex. Civ. App. 1936).

20. Rohrmoser v. Household Finance Corp., 231 Mo. App. 1188, 86 S.W.2d 103 (1935).

21. If the trial court followed the orthodox approach of tort liability, then this element is usually necessary. See note 12 *supra*. However, if the court adopted the same approach as the appellate court, this theory would be contrary to the position of RESTATEMENT, AGENCY § 262 (1933), and the recognized prevailing view.

22. The court cites no case directly on point and reasons by analogy, relying heavily on the case of Robert Howarth's Sons, Inc. v. Boortsales, 134 Pa. Super. 320, 3 A.2d 992 (1939). This case is weakened as authority in that there the principal facilitated the perpetration of the fraud by his own carelessness.

23. Instant case, 243 F.2d at 334.

24. The court quotes with approval the language of Robert Howarth's Sons, Inc. v. Boortsales, 134 Pa. Super. 320, 3 A.2d 992, 994 (1939) to the effect that the agent was "armed with the means of perpetrating a fraud. . . ."

defraud third persons and must assume the risk that this situation imposes when the agent exceeds his actual authority.

It must always be kept in mind that rules of law governing the responsibility of one person resulting from the conduct of another acting in his behalf are no more than reflections of current feeling as to what the scope of this responsibility should be. Here the court, reflecting a tendency toward extension of such responsibility,[25] felt that the principal should be held for such fraudulent conduct of his agent and found liability by an unusual application of the *Restatement of Agency*.[26] As a precedent, this approach may well be adopted by other courts in cases involving willful torts of the agent accomplished by means of misrepresentation.

CONSTITUTIONAL LAW—DUE PROCESS—ADMISSIBILITY IN STATE CRIMINAL PROSECUTION OF RESULTS OF BLOOD TEST TAKEN WHILE ACCUSED WAS UNCONSCIOUS

Petitioner, while unconscious as a result of an automobile accident, was subjected to a blood test to determine the alcoholic content of his blood. Upon trial for involuntary manslaughter the results of the tests were admitted in evidence over objection. After conviction, petitioner brought an original habeas corpus proceeding in the Supreme Court of New Mexico, seeking his release from custody on the ground that refusal to exclude this evidence violated due process of law as guaranteed by the fourteenth amendment because the manner in which the evidence was obtained offended the sense of justice. The writ was denied. On certiorari from the United States Supreme Court, *held*, affirmed. It is not a denial of due process under the fourteenth amendment to admit as evidence in a state criminal prosecution the results of blood tests obtained by state officers while the defendant was unconscious. *Breithaupt v. Abram*, 352 U.S. 432 (1957).

The bill of rights of the Federal Constitution protects the individual from unreasonable search and seizure by federal agencies and guarantees to him the privilege against self-incrimination in the federal courts. Thus, evidence obtained by federal officers as a result of unreasonable search and seizure is inadmissible in the federal

25. "The cases in which liability has been imposed under such circumstances are sporadic and do not represent any general tendency, except as it may be said truthfully that the general tendency is to extend the liability of the principal or master for the torts of an agent or servant." SEAVEY, STUDIES IN AGENCY 275, 276 (1949) referring to RESTATEMENT, AGENCY §§ 261-62 (1923).

26. RESTATEMENT, AGENCY §§ 261-62 (1923).

courts;[1] evidence obtained in violation of the privilege against self-incrimination is also excluded, at least insofar as "testimonial" evidence, as distinguished from "real" evidence, is concerned.[2] Certain of the rights protected from federal infringement by the bill of rights are also protected from state action by the due process clause of the fourteenth amendment, but only those rights which are "implicit in the concept of ordered liberty"[3] and "so rooted in the traditions and conscience of our people as to be ranked as fundamental"[4] are afforded this protection. Freedom of speech, of the press, and of religion have been held to be a part of the basic concept of "due process of law."[5] Due process in the fourteenth amendment has also been held to include the right to be free from unreasonable search and seizure by state officials;[6] but refusal of a state court to exclude evidence so obtained is not a violation of this right, the states being left free to adopt other means of enforcement if they so choose.[7] Thus, while such evidence is inadmissible in a number of states,[8] the majority hold it to be admissible.[9] The privilege against self-incrimination, on the other hand, since it was not regarded historically as part of the "law of the land," or as one of the basic rights of man, is not considered to be a part of the concept of "due process of law."[10] Though refusal, on the part of state courts, to exclude evidence obtained by compelled self-incrimination or by unreasonable search and seizure by state officials is not, of itself, a violation of due process, such action, if carried to gross extremes, may nevertheless violate the notion of a "fair trial" which is the fundamental guarantee of due process of law.

1. U.S. CONST. amend. IV; Weeks v. United States, 232 U.S. 383 (1914); 8 WIGMORE, EVIDENCE, § 2184 (3d ed. 1940).

2. Holt v. United States, 218 U.S. 245 (1910); 8 WIGMORE, EVIDENCE, § 2263 (3d ed. 1940).

3. See Palko v. Connecticut, 302 U.S. 319, 325 (1937).

4. Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).

5. Those rights guaranteed by the first eight amendments which have been held to be fundamental are: freedom of religion, Cantwell v. Connecticut, 310 U.S. 296 (1940); speech, DeJonge v. Oregon, 299 U.S. 353 (1937); Gitlow v. New York, 268 U.S. 652 (1925); press, Grosjean v. American Press Co., 297 U.S. 233 (1936); assembly, DeJonge v. Oregon, *supra;* and freedom from unreasonable searches and seizures, Wolf v. Colorado, 338 U.S. 25 (1949).

6. Wolf v. Colorado, 338 U.S. 25 (1949).

7. *Ibid.* Federal courts will not enjoin the use of evidence obtained as the result of unreasonable search and seizure in state criminal proceedings. Stefanelli v. Minard, 342 U.S. 117 (1951). The federal courts will, however, enjoin federal officers from transferring evidence so obtained to state officials so that the accused may be prosecuted in state courts where the evidence would be admissible. Rea v. United States, 350 U.S. 214 (1956).

8. See, *e.g.*, Atz v. Andrews, 84 Fla. 43, 94 So. 329 (1922) (dictum); Flum v. State, 193 Ind. 585, 141 N.E. 353 (1923); Youman v. Commonwealth, 189 Ky. 152, 224 S.W. 860 (1920); Tucker v. State, 128 Miss. 211, 90 So. 845 (1922).

9. See, *e.g.*, Banks v. State, 207 Ala. 179, 93 So. 293 (1921); Benson v. State, 149 Ark. 633, 233 S.W. 758 (1921); Jackson v. State, 156 Ga. 647, 119 S.E. 525 (1923) (per curiam); State v. Green, 121 S.C. 230, 114 S.E. 317, (1922).

10. Adamson v. California, 332 U.S. 46 (1947); Snyder v. Massachusetts, 291 U.S. 97 (1934); Twining v. New Jersey, 211 U.S. 78 (1908).

The differentiation depends upon a comparison of the methods used to obtain the evidence with the sense of justice and fair play of the community, though in the case of testimonial evidence the additional concern with probable unreliability comes to bear. Thus, refusal to exclude confessions obtained by state officers after merciless beatings,[11] after incessant questioning for a week,[12] and by apprehension of torture[13] has been held to violate due process. Furthermore, in *Rochin v. California*[14] evidence forceably extracted from the stomach of the accused, though "real" rather than "testimonial," was held to be inadmissible in a state court under the due process clause because the manner of obtaining the evidence was said to "shock the conscience."[15]

The defendant in the instant case sought to obtain his freedom through the application of the doctrine of the *Rochin* case. However, the Court did not find that element of brutality and offensiveness in the taking of blood, when done by a physician, that it found in the forced extraction of the contents of the defendant's stomach which it found in the *Rochin* case. It was recognized that the blood test procedure has become routine in everyday life, so that it is not "conduct which shocks the conscience," nor offends that "sense of justice" spoken of in *Brown v. Mississippi*.[16] The evidence was of a physical nature, and furnished a scientifically accurate method for determining the alcoholic content of the blood. Therefore, the objection of probable unreliability present in the coerced confession cases would not be applicable here.

In his dissent Mr. Chief Justice Warren states that the vague distinction between the instant case and the *Rochin* case is to be found only in "personal reaction to the stomach pump and the blood test." The blood test and the stomach pump are both scientific methods of making tests and relieving distress. In both cases the operation was performed by a physician, and in both cases body fluids were removed. The two cases, therefore, have much in common; and, without some distinguishing feature other than personal reaction, the same result would seem necessarily to follow. There was active resistance in the *Rochin* case, but there was no consent here either. Would the defendant be deemed to have consented to the test if he had submitted only after having been told that if he did not consent he would be forced to give blood for the test? The absence of physical resistance should not necessarily imply consent, especially where ability to resist is

11. Brown v. Mississippi, 297 U.S. 278 (1936).
12. Chambers v. Florida, 309 U.S. 227 (1940).
13. Malinski v. New York, 324 U.S. 401 (1945).
14. Rochin v. California, 342 U.S. 165 (1952).
15. *Id.* at 172.
16. 297 U.S. 278, 286 (1936).

lacking. There are instances in which the personal rights of citizens must necessarily be, to some extent, infringed upon for the common good. In weighing the interests here the Court found another instance in which the interests of society are paramount to private rights.

CONSTITUTIONAL LAW—PRIVILEGE AGAINST SELF-INCRIMINATION—EFFECT OF POSSIBLE FEDERAL PROSECUTION ON APPLICATION OF STATE IMMUNITY STATUTE IN STATE CRIMINAL PROCEEDINGS

Appellee, while appearing as a witness before a state grand jury in a proceeding under the Kentucky sedition laws,[1] refused to answer certain questions on the ground that the answers would tend to subject him to criminal prosecution by the federal government. A Kentucky statute[2] compelled witnesses to testify in such proceedings and granted them immunity from further prosecution. The questions were certified to the trial judge to determine if appellee was entitled to claim the privilege against self-incrimination. The judge ruled that if appellee apprehended danger of federal prosecution, he was privileged not to answer. On appeal, *held,* affirmed. Under protection of the state constitution a witness, though granted immunity from further state prosecution, may refuse to answer any question which may prove to be incriminating in a later prosecution under federal law. *Commonwealth v. Rhine,* 303 S.W.2d 301 (Ky. 1957).

The Federal Constitution[3] and the constitutions of forty-six of the states[4] guarantee the privilege against self-incrimination in criminal cases. The peculiarities of phrasing in the various constitutions neither enlarge nor narrow the scope of the privilege as it was known at common law.[5] The protection afforded extends to all proceedings where testimony is to be taken,[6] including investigations by a grand

1. KY. REV. STAT. ANN. §§ 432.020-.060 (1955). This statute was subsequently held unconstitutional, as applied to sedition against the federal government. Braden v. Commonwealth, 291 S.W.2d 843 (Ky. App. 1956).

2. KY. REV. STAT. ANN. § 432.070 (1955).

3. "[N]or shall be compelled in any criminal case to be a witness against himself . . . ." U.S. CONST. amend. V.

4. For an extensive list of such provisions, see 8 WIGMORE, EVIDENCE 321 (1940). For the status of the privilege in Iowa and New Jersey, see McGovney, *Self-Criminating and Self-Disgracing Testimony, Code Revision Bill,* 5 IOWA L. BULL. 174 (1919); State v. Fary, 19 N.J. 431, 117 A.2d 499 (1955).

5. Counselman v. Hitchcock, 142 U.S. 547 (1892); State v. Quarles, 13 Ark. 307 (1853).

6. United States v. Goodner, 35 F. Supp. 286 (D. Colo. 1940) (all proceedings wherein the defendant is acting as a witness in any investigation that requires him to give testimony that might tend to show him guilty of a crime);

jury;[7] it is broad enough to cover witnesses in a criminal case as well as the accused;[8] it is personal and cannot be invoked to protect a third person or an organization.[9] In order for a witness to claim the privilege, the danger of further prosecution must be real and appreciable,[10] but it is not necessary that the testimony desired be certain to subject the witness to prosecution or that it be conclusive proof of the whole crime without additional testimony by others.[11] The English rule on which federal and state constitutional guarantees are based generally did not protect the witness against disclosing offenses in violation of the laws of another country;[12] however, an English decision in 1867 held that the privilege would be accorded when the foreign law subjecting the witness to penalty was admitted or proved.[13] This divergent approach to the problem is reflected in the American decisions, but most American courts have found the former rule to be more persuasive and have not recognized the privilege in such cases.[14]

It is well established that the constitutional privilege against self-incrimination can be replaced by a statutory immunity.[15] It is generally said that the immunity afforded must be as broad as the privilege, but the Supreme Court has uniformly held that federal statutes

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Brophy v. Industrial Accident Commission, 46 Cal. App. 2d 278, 115 P.2d 835 (1941) (contempt proceeding); Taylor v. Commonwealth, 274 Ky. 51, 118 S.W.2d 140 (1938) (any criminal prosecution); 42 GEO. L.J. 552 (1954).

7. Grunewald v. United States, 353 U.S. 391 (1953); United States v. Monia, 317 U.S. 424 (1943); Bentler v. Commonwealth, 143 Ky. 503, 136 S.W. 896 (1911); Pick v. State, 143 Md. 192, 121 Atl. 918 (1923); State v. Smith, 56 S.D. 238, 228 N.W. 240 (1929).

8. McCarthy v. Arndstein, 266 U.S. 34 (1924); Counselman v. Hitchcock, 142 U.S. 547 (1892); State v. Quarles, 13 Ark. 307 (1853); Adams v. State, 129 Ga. 248, 58 S.E. 822 (1907); People *ex rel.* McKinney v. Richter, 182 Misc. 96 43 N.Y.S.2d 114 (N.Y.C. Magis. Ct. 1943).

9. United States v. White, 322 U.S. 694 (1944); Hale v. Henkel, 201 U.S. 43 (1906); United States v. Thomas, 49 F. Supp. 547 (W.D. Ky. 1943); People v. Schultz, 380 Ill. 539, 44 N.E.2d 601 (1942).

10. See Falknor, *Self-Crimination Privilege: "Links in the Chain,"* 5 VAND. L. REV. 479 (1952).

11. Blau v. United States, 340 U.S. 159 (1950); United States v. Molasky, 118 F.2d 128 (7th Cir. 1941); United States v. Weisman, 111 F.2d 260 (2d Cir. 1940). See 58 AM. JUR., *Witnesses* §§ 81, 82 (1948).

12. United States v. Murdock, 284 U.S. 141 (1931); Morgan, *The Privilege Against Self-Incrimination,* 34 MINN. L. REV. 1 (1949).

13. United States v. McRae, L.R. 3 Ch. App. 79 (1867).

14. The problem of incrimination in another jurisdiction can come up in four ways in our court system: (1) a witness in a state or federal court claims incrimination under the laws of a foreign country, (2) a witness in a state court claims incrimination under the laws of another state, (3) a witness in a state court claims incrimination under federal law, and (4) a witness in a federal court claims incrimination under state law. For a discussion of the problem and a list of cases covering each of the above situations, see MCCORMICK, EVIDENCE 260 (1954).

15. Brown v. Walker, 161 U.S. 591 (1895); *Ex parte* Critchlow, 11 Cal. 2d 751, 81 P.2d 966 (1938); *In re* Watson, 293 Mich. 263, 291 N.W. 652 (1940). For an excellent discussion of immunity statutes, see Brownell, *Immunity From Prosecution Versus Privilege Against Self-Incrimination,* 28 TUL. L. REV. 1 (1953).

granting immunity from federal, but not state, prosecution may replace the fifth amendment guarantee[16] and that state courts may require witnesses to answer even though the immunity granted by state law[17] does not extend to federal prosecutions.[18] Furthermore, most of the state courts have held that their constitutional guarantees do not relieve a witness from being forced to testify under a statutory grant of immunity just because he might thereby incriminate himself under the laws of another jurisdiction.[19] However, a minority of the state courts, knowing that the federal courts would not hesitate to admit evidence gained from such forced testimony,[20] have held otherwise, usually basing their decisions on the imminence or likelihood of further prosecution.[21]

In the instant case the court has carefully gathered the authority for granting the privilege in a state court when there is a danger of federal prosecution, and has adopted the rule of *People v. Den Uyl*[22] in holding it to be a "travesty on verity" to compel a witness to give testimony under a state immunity statute which cannot protect him against federal criminal prosecution. The danger inherent in our system of dual sovereignties that testimony given in a state court may forthwith be used in a federal court if applicable legislation exists has been largely ignored or treated as of no consequence by the majority of the state courts.[23] The present holding would make the mere existence

16. United States v. Murdock, 284 U.S. 141 (1931); Hale v. Henkel, 201 U.S. 43 (1906); Jack v. Kansas, 199 U.S. 372 (1905); Brown v. Walker, 161 U.S. 591 (1895). See also *In re* Watson, 293 Mich. 263, 291 N.W. 652 (1940) (dictum, for discussion of federal rule). The most recent pronouncement by the Court in Ullmann v. United States, 350 U.S. 422 (1955), held that immunity "in any court" as used in the Federal Immunity Act of 1954, 18 U.S.C. § 3486 (Supp. II, 1955), applies also to state courts and that the act would constitutionally provide immunity from state prosecution. See Conley, *The Federal Immunity Statute and Its Potential For Protecting the Witness Against State Prosecution*, 16 U. PITT. L. REV. 61 (1954).

17. For an extensive list of state statutes, see 8 WIGMORE, EVIDENCE, 478 (1940).

18. Jack v. Kansas, 199 U.S. 372 (1905).

19. State *ex rel.* Mitchell v. Kelly, 71 So. 2d 887 (Fla. 1954) (witness feared federal incrimination); People *ex rel.* Akin v. Butler Street Foundry & Iron Co., 201 Ill. 236, 66 N.E. 349 (1903) (witness feared both federal and further state incrimination); Greece v. Koukouras, 264 Mass. 318, 162 N.E. 345 (1928) (witness feared foreign incrimination); Doyle v. Hofstader, 257 N.Y. 244, 177 N.E. 489 (1931), *affirming order in* 234 App. Div. 613, 251 N.Y. Supp. 802 (1st Dep't 1931) (witness feared federal incrimination); State v. March, 46 N.C. 526 (1854) (witness feared further state incrimination). "[A]ll that the state is required to or can do is to give immunity against its own processes. . . ." *In re* Greenleaf, 176 Misc. 566, 28 N.Y.S.2d 28, 31 (N.Y. County Ct. Gen. Sess. 1941).

20. Feldman v. United States, 322 U.S. 487 (1943).

21. State *ex rel.* Doran v. Doran, 215 La. 151, 39 So. 2d 894 (1949); People v. Den Uyl, 318 Mich. 645, 29 N.W.2d 284 (1947).

22. 318 Mich. 645, 29 N.W.2d 284 (1947).

23. See, *e.g.*, Doyle v. Hofstader, 257 N.Y. 244, 177 N.E. 489 (1931), *affirming order in*, 234 App. Div. 613, 251 N.Y. Supp. 802 (1st Dep't 1931) (witness forced to admit false tax returns); People *ex rel.* Akin v. Butler Street Foundry & Iron Co., 201 Ill. 236, 66 N.E. 349 (1903) (witness forced to admit antitrust violations).

of federal legislation under which action could be taken sufficient "probability" of further prosecution to warrant granting the privilege against self-incrimination in state courts.

The ultimate answer to this problem must be based on an evaluation of the worth of the privilege today. Either it is an "immutable principle of justice" or it is an "obstructive anachronism" which serves only to block one avenue for arriving at the truth.[24] If the beneficial effect of the privilege outweighs its deterrent result, the forcing of testimony in return for an immunity which is not as wide in scope as the privilege is not warranted. The problem need not arise in federal prosecutions since the federal government can give immunity from further prosecution even in state courts;[25] but this is not the case with a state immunity statute, which cannot protect the witness from federal prosecution.[26] The fact of concurrent state and federal jurisdiction in many areas makes a state immunity statute which purports to operate in such areas a meaningless legal fiction which only serves to thwart the policy of the privilege.

CONSTITUTIONAL LAW—MILITARY JURISDICTION—CAPITAL OFFENSES COMMITTED BY CIVILIAN DEPENDENTS ACCOMPANYING ARMED FORCES ABROAD IN PEACETIME

Two wives of members of the armed forces were tried and convicted by courts-martial for the alleged murder of their husbands, whom they had accompanied overseas. Each was sentenced to life imprisonment and transported to a federal prison in the United States.[1]

24. The primary argument against the privilege is that it operates principally in aid of the guilty; it can be said that its purpose and effect from the time of its origin was the obstruction of criminal laws which the community thought to be unrighteous. The primary argument in favor of the privilege is that it protects the privacy of the individual by shielding him from judicial inquisition. See MCCORMICK, EVIDENCE 290 (1954). On the value of the privilege, see GRISWOLD, THE FIFTH AMENDMENT TODAY (1955).

25. See note 16 *supra*.

26. See note 18 *supra*.

1. Mrs. Clarice B. Covert was tried while in England for violation of article 118 of the Uniform Code of Military Justice (hereinafter referred to as UCMJ), 64 STAT. 140 (1950), 50 U.S.C. § 712 (1952), recodified into positive law by Act of Aug. 10, 1956, c. 1041, § 1, 70A STAT. 1, now 10 U.S.C. § 918 (Supp. IV, 1957). Although she pleaded insanity, she was convicted of murdering her husband, an Air Force sergeant, and sentenced to life imprisonment. Affirmed by the Air Force Board of Review, United States v. Covert, 16 C.M.R. 465 (1954); *reversed*, 6 U.S.C.M.A. 48, 19 C.M.R. 174 (1955) for prejudicial errors relating to the defense of insanity. She was then transferred from the federal prison to the District of Columbia jail to await retrial by court-martial at Bolling Air Force Base, Washington, D.C. Mrs. Dorothy K. Smith was convicted by court-martial for the murder of her husband, an Army colonel, while in Japan. Affirmed by the Army Board of Review, United

A habeas corpus proceeding was instituted in each instance,[2] resulting in initial hearing as companion cases by the Supreme Court. The Court initially upheld the constitutionality of article 2(11) of the Uniform Code of Military Justice[3] under which the jurisdiction of military courts-martial over these civilians had been established.[4] On rehearing, *held,* judgment directing the release of Covert affirmed; judgment denying the release of Smith reversed. Article 2(11) of the Uniform Code of Military Justice cannot be constitutionally applied in times of peace to trials of capital offenses of civilian dependents of the armed forces overseas. *Reid v. Covert,* 354 U.S. 1 (1957).

It has been settled in the past that Congress may create legislative courts[5] for the purpose of dealing with offenses committed beyond the territorial limits of the United States as a necessary and proper method of carrying out enumerated constitutional powers.[6] Such

States v. Smith, 10 C.M.R. 350, *aff'd,* 13 C.M.R. 307 (1953); *aff'd,* 5 U.S.C.M.A. 314, 17 C.M.R. 314 (1954).

2. The petition for Mrs. Smith was filed by her father, Walter Krueger, and was discharged, United States *ex rel.* Krueger v. Kinsella, 137 F. Supp. 806 (S.D.W. Va. 1956). An appeal was taken to the United States Court of Appeals for the Fourth Circuit, challenging the constitutionality of article 2(11) of the UCMJ. While the appeal was pending, the Government requested certiorari, which was granted. Kinsella v. Krueger, 350 U.S. 986 (1956). Petitioner Covert also attacked the constitutionality of article 2(11), UCMJ, and challenged the validity of the continuance of military jurisdiction upon her transfer to the United States. The writ was issued, Covert v. Reid, 24 U.S.L. WEEK 2238 (D.D.C. 1955) (per curiam) and the Government appealed directly to the Supreme Court. The Court postponed hearing until both cases would be heard, Reid v. Covert, 350 U.S. 985 (1956).

3. 64 STAT. 109 (1950), 50 U.S.C. § 552 (1952), recodified into positive law by Act of Aug. 10, 1956, c. 1041, § 1, 70A STAT. 1 to 10 U.S.C. § 802 (Supp. IV, 1957): "The following persons are subject to this chapter [code]: . . .(11) Subject to [the provisions of] any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, [all] persons serving with, employed by, or accompanying the armed forces outside [without the continental limits of] the United States . . . ." (Bracketed words were part of the original statute but are not found in the recodification).

4. Kinsella v. Krueger, 351 U.S. 470, *rehearing granted,* 352 U.S. 901 (1956); Reid v. Covert, 351 U.S. 487, *rehearing granted,* 352 U.S. 901 (1956). The decisions in these cases were far from unanimous. Chief Justice Warren, Justices Black and Douglas made a dissent applicable to both decisions in which it was stated that the decisions gave the military "new powers not hitherto thought consistent with our scheme of government." Kinsella v. Krueger, *supra* at 486. Justice Frankfurter made a reservation, *id.* at 481-85. This dilution of the authoritative weight of the decision served to indicate that the law in this field was by no means settled at that time. Too, it is to be pointed out that Justice Brennan (who voted with the majority in the rehearing) was not a member of the Court at the time of the first hearing.

5. "Those established under the specific power given in section 2 of Article III are called constitutional courts. . . . On the other hand, those created by Congress in the exertion of other powers are called legislative courts." *Ex parte* Bakelite Corp., 279 U.S. 438, 449 (1929).

6. American Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511 (1828) (powers enumerated in U.S. CONST. art. IV, § 3, para. 2 to make laws regulating territories belonging to the United States, when coupled with general powers of sovereignty, give Congress power to establish legislative courts in the Florida territory).

tribunals may be created in United States territories by direct legislation, but their establishment in a foreign nation requires a treaty or an executive agreement with the foreign sovereignty. That these legislative courts are not necessarily bound by all the traditional constitutional gnaranties has been previously established by a long line of decisions.[7] Though courts-martial conducted in foreign territory are not legislative courts of the same nature as are "consular" or "territorial" courts, Congress may define their functions and mode of procedure also, once jurisdiction has been obtained from the foreign sovereignty.[8] The Supreme Court, on initial hearing of the instant case, felt that the decisions sustaining these legislative courts gave sufficient basis for extending military jurisdiction over certain civilians under article 2(11) of the Uniform Code without calling into question the function of article I, section 8, clause 14 of the Constitution of the United States[9]—the specific provision dealing with regulation of the armed forces.[10] That this clause allows the trial and punishment of military offenses by procedures not within the provisions of article III, section 2 of the Constitution[11] has never been in doubt.[12] Although

7. Balzac v. Porto Rico, 258 U.S. 298 (1922) (privilege of jury trial does not extend to unincorporated territorial acquisition in certain instances); Dorr v. United States, 195 U.S. 138 (1904) (Congress can deny jury trials in the unincorporated Phillipine Islands); Hawaii v. Mankichi, 190 U.S. 197 (1903) (citizens of Territory of Hawaii do not receive full fifth and sixth amendment privileges if Congress does not so provide); *In re* Ross, 140 U.S. 453 (1891) (consular court can exercise jurisdiction without providing grand jury indictment or jury trial); American Ins. Co. v. Canter, *supra* note 6 (legislative court in Florida territory not restricted by other constitutional provisions). See also *Ex parte* Bakelite Corp., 279 U.S. 438, 449 (1929) (in speaking of legislative courts: "Their functions always are . . . prescribed independently of section 2 of Article III . . . ."); Downes v. Bidwell, 182 U.S. 244 (1901) (congressional acquisition of territory not hampered by other constitutional limitations).

8. The relinquishment of jurisdiction by the foreign nation upon which UCMJ art. 2(11) was made to depend was achieved in the present case by: Agreement With The United Kingdom, July 27, 1942, 57 STAT. 1193, E.A.S. No. 355 (Covert); Administrative Agreement With Japan, Feb. 28, 1952, 3 U.S. TREATIES & OTHER INT'L AGREEMENTS 3342, T.I.A.S. No. 2492 (Smith). Essentially, both allowed military jurisdiction over offenses committed by United States forces in those nations.

9. "To make Rules for the Government and Regulation of the land and naval Forces . . . ."

10. "Having determined that one in the circumstances of Mrs. Smith may be tried before a legislative court established by Congress, we have no need to examine the power of Congress 'To make Rules for the Government and Regulation of the land and naval Forces.' " Kinsella v. Krueger, 351 U.S. 470, 476 (1956).

11. This article provides for the United States judicial power and deals with the jurisdictional scope of the national courts.

12. Dynes v. Hoover, 61 U.S. (20 How.) 65, 79 (1857) (in referring to article III judicial powers as opposed to the power to punish military offenses, the Court said: "[T]he two powers are entirely independent of each other."); *Ex parte* Potens, 63 F. Supp. 582 (E.D. Wis. 1945). See also U.S. CONST. amend. V, which, in prescribing that "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury," excludes "Cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger . . . ."

past decisions have tended to limit any broad extensions of military jurisdiction over nonmilitary persons under article 1,[13] lower federal courts have held that civilians having some direct relationship with the armed forces are subject to the jurisdiction of military tribunals;[14] and the Supreme Court, without passing directly on the constitutionality of such jurisdiction, did, in 1952, uphold the conviction, by military commission, of a civilian dependent accused of murdering her military husband while in Germany.[15]

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13. See United States *ex rel.* Toth v. Quarles, 350 U.S. 11 (1955) (discharged serviceman cannot be constitutionally tried by court-martial for offenses committed while in service). The *Toth* case can be factually distinguished from the present case, but is an important forerunner of the theories prevailing in the latter. In speaking of the conflict that arises between article I and article III when the former is interpreted to allow military jurisdiction over civilians, the Court stated: "[T]he power granted Congress . . . [under art. I, § 8, cl. 14] would seem to restrict court-martial jurisdiction to persons who are *actually members or part* of the armed forces." *Id.* at 15. (Emphasis added.) See also Duncan v. Kahanamoku, 327 U.S. 304 (1946) (military tribunals cannot supplant judicial trial of civilians for offenses not relating to the war); Givens v. Zerbst, 255 U.S. 11, 19 (1921) (proof required that accused is member of military before military jurisdiction can attach, the Court stating: "Undoubtedly courts-martial are tribunals of special and limited jurisdiction whose judgments, so far as questions relating to their jurisdiction are concerned, are always open to collateral attack."); *Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866) (if civil courts are open and functioning, civilians cannot be tried by military commissions acting pursuant to article I); Ver Mehren v. Sirmyer, 36 F.2d 876 (8th Cir. 1929) (improper induction into armed forces nullifies military jurisdiction).

14. Primarily, the decisions involved interpretations of article 2(d) of the Articles of War: "The following persons are subject to these articles: . . . (d) All persons accompanying or serving with the armies of the United States without the territorial jurisdiction of the United States . . ." Act of Aug. 29, 1916, c. 418, art. 2(d), 39 STAT. 651 [later repealed by 64 STAT. 147 (1950)]. This article was enacted in 1916 pursuant to article I, section 8, clause 14 of the Constitution. UCMJ art. 2(11) is the later revision of this article. See Perlstein v. United States, 151 F.2d 167 (3d Cir. 1945) (discharged civilian employee formerly engaged in salvage operations in Africa but awaiting transportation to United States, came within article 2(d)), *cert. granted*, 327 U.S. 777, *dismissed as moot*, 328 U.S. 822 (1946); Grewe v. France, 75 F. Supp. 433 (E.D. Wis. 1948) (mechanical engineer with Engineer Corps in Germany subject to military trial); *In re* Berue, 54 F. Supp. 252 (S.D. Ohio 1944) (merchant seaman on supply ship subject to military jurisdiction); *In re* Di Bartolo, 50 F. Supp. 929 (S.D.N.Y. 1943) (civilian employee of government contractor in Africa subject to military jurisdiction even though discharged from employment); McCune v. Kilpatrick, 53 F. Supp. 80 (E.D. Va. 1943) (civilian cook on army transport comes within article 2(d)); *Ex parte* Jochen, 257 Fed. 200 (S.D. Tex. 1919) (civilian superintendant of Quartermaster Corps subject to court-martial); *Ex parte* Falls, 251 Fed. 415 (D.C.N.J. 1918) (civilian cook on vessel transporting army supplies subject to military jurisdiction); *Ex parte* Gerlach, 247 Fed. 616 (S.D.N.Y. 1917) (discharged mate traveling on military transport subject to court-martial jurisdiction). See also 4 BULL. JAG 223-29 (1945). Even prior to article 2(d) it was recognized that all "suttlers and retainers" to the camp and certain other civilians serving with the armed forces in the field during time of war were subject to military jurisdiction. See WINTHROP, MILITARY LAW AND PRECEDENTS 97-102 (2d ed. 1896).

15. Madsen v. Kinsella, 343 U.S. 341 (1952) (wherein it was determined that the wife had "accompanied" the armed forces within the purview of article 2(d) of the Articles of War). In the instant case, 354 U.S. at 35 n. 63, the Court distinguishes *Madsen v. Kinsella* by stating that *Madsen* arose

Thus, there were two distinct (though not mutually exclusive) bases available for sustaining the constitutionality of article 2(11) of the Uniform Code at the time of the instant case; *i.e.*, the legislative court precedent and the article I powers as previously construed. Nevertheless, the Court[16] struck down the application of article 2(11) to trials of capital offenses of civilian dependents during peacetime, holding that the legislative court decisions relied on in the initial hearing[17] were not sufficient in themselves to justify such an extension of military jurisdiction[18] and that such jurisdiction must therefore conflict with article III, section 2 and the fifth and sixth amendments unless article I could be reasonably construed to authorize such extensions. By a narrow interpretation of clause 14 of article I, the Court concluded that since these wives were not actually "in" the armed forces, the clause did not apply to them.[19] Thus, the Court not only departed from the notion that such civilians, having become an integral part of the extraterritorial military community, are nec-

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in conquered territory being held by our armed forces and thus broader powers were available to the military than at present.

16. It must be pointed out that there was no true majority opinion. The concurring opinions of Justices Frankfurter and Harlan, who, with Chief Justice Warren, Justices Black, Douglas and Brennan constituted the majority, were different in many respects from that of Justice Black, speaking for the Court. Black's narrow interpretation of UCMJ art. 2(11) was challenged by both concurring opinions. Harlan, reversing his stand from the previous decisions, based his concurrence solely upon the fact that the offenses were capital, finding article 2(11) otherwise completely applicable. Both Frankfurter and Harlan disapproved of Black's summary disposal of the legislative court cases.

17. *In re* Ross, 140 U.S. 453 (1891) and the *"Insular Cases," i.e.*, Balzac v. Porto Rico, 258 U.S. 298 (1922); Dorr v. United States, 195 U.S. 138 (1904); Hawaii v. Mankichi, 190 U.S. 197 (1903); Downes v. Bidwell, 182 U.S. 244 (1901).

18. The *Ross* case was dismissed as ". . . [A] relic from a different era." 354 U.S. at 12. As to the *"Insular Cases,"* it was said: ". . . [N]either the cases nor their reasoning should be given any further expansion." *Id.* at 14. The Court also dismissed the idea that article 2(11) of the Uniform Code could be sustained as a necessary and proper implementation of the foreign agreements involved. *Id.* at 16. But see *id.* at 67 (Justice Harlan concurring): "I do not go as far as my brother Black. . . . His opinion . . . in effect discards *Ross* and the *'Insular Cases'* as historical anomalies. I believe that those cases, properly understood, still have vitality . . . [and] an important bearing on the question now before us."

19. 354 U.S. at 22: "Clause 14 does not encompass persons who cannot fairly be said to be 'in' the military service." See also *id.* at 33: "The mere fact that these women had gone overseas with their husbands should not reduce the protection the Constitution gives them." But see *id.* at 43 (Justice Frankfurter concurring): "The cases cannot be decided simply by saying that, since these women were not in uniform, they were not 'in the land and naval Forces.' The Court's function in constitutional adjudications is not exhausted by a literal reading of words." See also *id.* at 70 (Justice Harlan discussing the article I power): "I do not think the courts-martial of these army wives can be said to be an arbitrary extension of congressional power. It is suggested that . . . Article I . . . could apply only to those in the actual service of the armed forces. I cannot agree that this power has any such rigid content."

essarily subject to its discipline,[20] but also undermined to some extent the previously well established principle that the Constitution is limited territorially in its application. It was indicated that this result was in keeping with the traditional policy of keeping the military subordinate to the civil authorities.[21] That Congress could act in such matters was conceded,[22] but, having raised this problem for the legislators, the Court not only failed to give any guidance as to what future action would be limited by its decision, but also hedged its ruling with certain qualifications,[23] leaving no clear indication of the possible steps to be taken.

If such civilian capital offenders are not to escape punishment in the future, Congress must now devise some solution. Considering the number of such individuals potentially affected, the problem is serious.[24] Under whose jurisdiction will "capital" offenders now fall? If article 2(11) is modified to conform to the present decision, it must afford full constitutional guaranties to such persons. Congress may meet this

20. ". . . [T]hese civilian dependents are part of the miltary community overseas, are so regarded by the host country, and must be subjected to the same discipline if the military commander is to have the power to prevent activities which would jeopardize the security and effectiveness of his command." 354 U.S. at 72 (Justice Harlan concurring).

21. See discussion in instant case, 354 U.S. at 23-30, concluding with: "In light of this history, it seems clear that the Founders had no intention to permit the trial of civilians in military courts, where they would be denied jury trials and other constitutional protections, merely by giving Congress the power to make rules which were 'necessary and proper' for the regulation of the 'land and naval Forces'. Such a latitudinarian interpretation of these clauses would be at war with the well-established purpose of the Founders to keep the military strictly within its proper sphere, subordinate to civil authority." See also WINTHROP, MILITARY LAW AND PRECEDENTS 107 (2d ed. 1896) (quoted with approval in 354 U.S. at 35): "[*A*] *statute cannot be framed by which a civilian can lawfully be made amenable to the military jurisdiction in time of peace.*" (Emphasis added by author.)

22. "No one, however, challenges the availability to Congress of a power to provide for trial and punishment of these dependents for such crimes. The method of trial alone is in issue." 354 U.S. at 47 (Justice Frankfurter concurring).

23. Since the holding was confined to "capital" offenses in "peacetime," many questions arise as to implementation of the decision in the future. *I.e.*, (1) would a non-capital offense come within the confines of the decision? Apparently not. Although Justice Black appears more reticent to concede this exception, both Justices Frankfurter and Harlan are explicit as to this point, and without their support, the decision could not have been as rendered. It is difficult to see, however, that if military jurisdiction is onerous, it is any the less so upon the noncapital offender. (2) Would a capital offense committed in wartime be subject to the decision's limitations? Probably not. The Court throughout seems to recognize that broad powers are available during such periods. (3) What is "peacetime"? Under present world conditions it is very difficult to make nice distinctions between peace and war.

24. "Reliable figures show that our Armed Forces overseas are accompanied by approximately a quarter of a million dependents and civilian workers. Figures relating to the Army alone show that in the 6 fiscal years from July 1, 1949, to June 30, 1955, a total of 2,280 civilians were tried by courts-martial. While it is true that the vast majority of these prosecutions were for minor offenses, the volume alone shows the serious problem that would be presented by the administration of a dual system of courts." Kinsella v. Krueger, 351 U.S. 470, 477 n.7 (1956).

problem in several possible ways. It might provide for a system of extraterritorial "constitutional" courts. This possibility is fraught with problems.[25] It could provide that these civilians be brought back to the United States and tried at one of the seaboard federal district courts. Though this solution is feasible, it also possesses certain limitations.[26] Of course, the offenders might be turned over to the host country and subjected to foreign jurisdiction; but, in view of American policy treatment of similar suggestions in the past and, more especially, the political repercussions arising from the recent *Girard* case,[27] this seems highly unlikely.[28] Quite likely, the final solution could be a new policy of the armed forces denying all civilian dependents the privilege of accompanying the military beyond the continental limits.[29] This too forebodes political repercussions. It would seem—in view of the facts that extreme practical difficulties are presented in obtaining jurisdiction over these persons, that these dependents do have strong ties with the military and do play a vital role in the effective performance of the military mission, and that military procedure does not seem to be so lacking in due process as to be inherently arbitrary[30]—that it could have well been held that a less onerous means of effecting the necessary and proper end was not readily available.[31]

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25. Assuming that Congress could readily establish courts meeting the constitutional requirements and could secure a relinquishment of jurisdiction from the foreign nation affected, is Congress to provide such a judicial system in all sixty-three nations in which American forces are situated? Too, of whom would the necessary juries be composed—foreign nationals or members of the military community, either civilian or military? If the former, this would seem no better a solution than turning the offenders over to foreign jurisdiction in the first instance. If the latter, are not these persons as much subject to "command influence" as would be the members of a court-martial? This alternative seems extremely impractical.

26. If needed, how could foreign witnesses be required to appear, and, how could depositions be demanded of a foreign national? Further, this solution would prove to be somewhat expensive, especially so if later decisions were to expand the instant case to apply also to noncapital offenses.

27. Wilson v. Girard, 354 U.S. 524 (1957) (authority of the executive branch, in construing an executive agreement, to relinquish jurisdiction to Japan over an American soldier accused of killing a Japanese national, upheld).

28. Were this to be the result however, it should be noted that a system of jury trials, and other fundamentals of Anglo-American justice, are by no means common to all the nations in which American forces are situated. Therefore, offenders would be subjected to punishment administered by foreign courts without the safeguards deemed so essential by the Court in invalidating military jurisdiction.

29. See discussion of these alternatives in the dissenting opinion of Justice Clark, 354 U.S. at 80-90.

30. See Kinsella v. Krueger, 351 U.S. 470, 478-79 (1956). *But see* instant case, 354 U.S. at 35-39. Several letters discussing military justice and the lawyer in the military have recently appeared in the "Views of Our Readers" section of the *American Bar Association Journal.* See *e.g.*, letter from James G. Utrecht to *American Bar Association Journal*, 43 A.B.A.J. 677 (1957).

31. It is felt that article 2(11) of the Uniform Code of Military Justice could have been sustained under the traditional standard of the "necessary and proper" clause as stated by Chief Justice John Marshall: "We admit, as all

CORPORATIONS—ELECTION OF DIRECTORS—CONFLICT BETWEEN CONSTITUTIONAL RIGHT OF CUMULATIVE VOTING AND STATUTE AUTHORIZING CLASSIFICATION OF DIRECTORS

Plaintiff,[1] a stockholder and director of defendant corporation, sought a declaratory judgment to determine whether a statute[2] granting the right to classify corporate directors and stagger their terms was a violation of a right protected by the Pennsylvania Constitution[3] to vote cumulatively in all elections of directors. Plaintiff contended that the operation of this statute would prevent the use of cumulative voting to its full advantage and consequently was a violation of his constitutional right. On appeal from a judgment for defendant, *held,* affirmed. A state statute authorizing a staggering of director elections does not violate the state constitutional grant of the right of cumulative voting, for this grant is not a guarantee of maximum efficiency of this method of obtaining minority representation on the board of directors. *Janney v. Philadelphia Transp. Co.*, 387 Pa. 282, 128 A.2d 76 (1956).

Cumulative voting[4] is generally conceded to have as its objective representation of minority stockholders on the board of directors.[5]

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must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819). See also Knox v. Lee, 79 U.S. (12 Wall.) 457 (1870); Hepburn v. Griswold, 75 U.S. (8 Wall.) 603 (1869); United States v. Fisher, 6 U.S. (2 Cranch) 358 (1805).

1. Amici Curiae briefs were filed in the Supreme Court by the Pennsylvania R.R. Co., the Curtis Publishing Co., The Latrobe Steel Co., and the American Window Glass Co.

2. PA. STAT. ANN. tit. 15, §§ 48, 2852-4, 2852-1202 (1938).

3. Art. 16, § 4.

4. Cumulative voting entitles each shareholder to as many votes for directors as the product of multiplying the number of shares he has times the number of directors to be elected. See, BALLANTINE, CORPORATIONS § 177 (1946); 3 COOK, CORPORATION § 609a (8th ed. 1923).

5. The minority shareholders of a sufficiently large number of shares can gain representation on the board if they cast the total number of their votes for one director. To find the percentage of shares needed to elect a single director (X) where cumulative voting is allowed, take the total percentage of shares voting (100%), divide this by the number of directors to be elected plus one (N+1), and add one share to the quotient. $X = \frac{100\%}{N+1} + 1$. If four directors are being elected, 20% of the stock plus one share could elect a single director.

$$X = \frac{100\%}{4+1} + 1 \text{ share} = 20\% + 1 \text{ share}.$$

In a number of states this privilege is made mandatory either by constitutional provision[6] or statute,[7] while under the statutes of other jurisdictions the privilege is merely permissive.[8] Classification of directors[9] is a system in which the board of directors is divided into two or more groups chosen at separate elections.[10] Classification is said to achieve continuity of experienced directors[11] and to make it more difficult for outside interests to acquire representation.[12] Where a constitutional provision for cumulative voting is found to co-exist with a statute that allows staggering or classification of directors, a conflict appears to be present. Such a statute would appear to undermine the constitutional right of cumulative voting, for, by decreasing the number of directors to be elected at any one time, the size of the minority required to elect a single director is noticeably increased.[13]

The number of shares needed to elect more than one director can be determined by multiplying the numerator by the desired number of directors. To elect two of four directors would take 40% plus one share.

$$X = \frac{2\ (100\%)}{4+1} + 1 \text{ share} = 40\% + 1 \text{ share.}$$

6. Cumulative voting in corporate elections has been made mandatory by constitutional provision in thirteen states. ARIZ. CONST. art. 14, § 10; IDAHO CONST. art. 11, § 4; ILL. CONST. art. XI, § 3; KY. CONST. § 207; MISS. CONST. art. 7, § 194; MO. CONST. art. 11, § 6; MONT. CONST. art. XV, § 4; NEB. CONST. art. XII, § 5; N.D. CONST. art. VII, § 135; PA. CONST. art. 16, § 4; S.C. CONST. art. 9, § 11; S.D. CONST. art. XVII, § 5; W. VA. CONST. art. XI, § 4.

7. The privilege is made mandatory in seven states by statute. ARK. STAT. ANN. § 64-244 (1947); CAL. CORP. CODE ANN. § 2235 (Deering 1953); KAN. GEN. STAT. ANN. § 17-3303 (1949); MICH. STAT. ANN. § 21.32 (1937); OHIO REV. CODE ANN. § 1701.58 (Baldwin 1953); WASH. REV. CODE § 23.32.070 (1952); WYO. COMP. STAT. ANN. § 44-109 (1945).

8. Twenty states have such statutes. COLO. REV. STAT. ANN. § 31-2-4 (1953); DEL. CODE ANN. tit. 8, § 214 (1953); FLA. STAT. ANN. § 608.10 (Supp. 1954); IND. ANN. STAT. § 25-207 (1955); LA. REV. STAT. § 12:32 (1950); MD. ANN. CODE art. 23, § 39(3) (1951); MINN. STAT. ANN. § 301.26(3) (1947); NEV. COMP. LAWS § 1629 (1929); N.H. REV. STAT. ANN. § 294:85 (1955); N.J. REV. STAT. § 14:10-15 (1937); N.M. STAT. ANN. § 51-6-6 (1953); N.Y. STOCK CORP. LAW § 49; N.C. GEN. STAT. § 55-110 (1950); OKLA. STAT. ANN. tit. 18, § 1.68 (1951); ORE. REV. STAT. § 57.170(4) (1953); R.I. GEN. LAWS ANN. c. 116, § 23 (1938); TENN. CODE ANN. § 48-313 (1956); TEX. BUS. CORP. ACT art. 2.29 (1956); VT. STAT. § 5784 (1947); VA. CODE ANN. § 13-203 (1950).

9. There are eight states that permit classified boards where cumulative voting is mandatory. ILL. REV. STAT. c. 32, § 157.35 (1955); KY. REV. STAT. ANN. § 271.345(4) (1955); MO. REV. STAT. § 351.315 (1949); MONT. REV. CODES ANN. §§ 15-402-403 (1947); NEB. REV. STAT. § 21-115 (1943); N.D. REV. CODE § 10-0508 (1943); PA. STAT. ANN. tit. 15, § 1074-403 (1938); W. VA. CODE ANN. § 3028 (1955).

10. Thus the shareholder would determine the number of votes he has by multiplying the number of directors *to be elected at this meeting* times the number of shares he owns.

11. Staggering of directors is considered to be a control device. See, BALLANTINE, CORPORATIONS § 1182 (1946). Where a group keeps the experienced directors on the board it is likely that the "experienced" directors are those who have the most favorable attitude towards the control group.

12. It is, of course, more difficult to gain a representation on the board of directors where, because of classification into two or more groups, the outside interest must wait until the next election to unseat the directors that had previously been elected by the control group.

13. To illustrate the effect of classification on the right of cumulative voting suppose that a corporation has a board composed of nine directors. To deter-

Thus, the purpose of cumulative voting, minority representation, is adversely affected.

The recent case of *Wolfson v. Avery*[14] held that a staggering statute is invalid where there is a constitutional guarantee of the cumulative voting privilege. The language of the constitution was interpreted to guarantee to a minority the right of representation on the board in the same proportion that their shares bear to the total number of shares.[15] Because it required a much larger minority to gain a single representative on a classified board, the classification statute was construed as being unconstitutional. The court in the instant case distinguishes the *Wolfson* case on the basis of a difference in the language of the two constitutional provisions.[16] The instant case holds that the Pennsylvania Constitution, while granting the right of cumulative voting, does not guarantee success in gaining director representation in proportion to the shareholdings of the minority.[17] The court gives other examples of corporate usages diluting voting strength, the validity of which might be subject to question if classification were declared

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mine the percentage of votes needed to elect a single director use the formula given in note 5 *supra*.

$$X = \frac{100\%}{9+1} + 1 \text{ share} = 10\% + 1 \text{ share}$$

to elect a single director when all nine members of the board are chosen at a single election. Suppose that under a classification statute the board is divided into three classes of three directors each.

$$X = \frac{100\%}{3+1} + 1 = 25\% + 1 \text{ share}$$

to elect one of the classified board. There is a 250% increase in the number of shares needed to elect a single director when the same board is staggered.

14. 6 Ill. 2d 78, 126 N.E.2d 701 (1955). See Stephan, *Cumulative Voting and Classified Boards: Some Reflections on Wolfson v. Avery.* 31 NOTRE DAME LAW. 351 (1956).

15. The Illinois Supreme Court held that the purpose of the constitutional provision was "to afford a minority protection in proportion to its voting strength." 126 N.E.2d at 710.

16. The cumulative voting provision of the Pennsylvania Constitution reads as follows: "In all elections for directors or managers of a corporation each member or shareholder may cast the whole number of his votes for one *candidate*, or distribute them upon two or more *candidates*, as he may prefer." PA. CONST. art. 16, § 4 (Emphasis added.) The Illinois Constitution states that each shareholder shall have the right "to cumulate said shares, and give one candidate as many votes as the number of *directors* multiplied by the number of his shares of stock shall equal, or to distribute them on the same principle among as many candidates as he shall see fit. . . ." ILL. CONST. art. XI, § 3 (Emphasis added.) The Pennsylvania court takes the view that the classification of directors creates candidates for election, and that the language of the Pennsylvania Constitution is broad enough to allow this construction. The term "directors" in the Illinois Constitution is viewed by the Illinois court as meaning that all directors are to be elected at one time, and the number of shares was to be multiplied by the *total* directors.

17. To support this proposition, Humphrys v. Winous Co., 165 Ohio St. 45, 133 N.E.2d 780 (1956) is cited by the court in a footnote, but this case is distinguishable in that it deals with a *statute* that makes mandatory the right of cumulative voting.

unconstitutional.[18] Because of the nearly three-quarters of a century that staggering has been widely employed under the statute, the court feared that the legality of the elections and the validity of the acts of many corporate directors might be challenged if the classification statute was nullified.[19]

The distinction made by the court between the instant case and the *Wolfson* case appears to be weak. The court may have failed to look adequately into the intent of the constitutional framers. Such intent might reasonably be determined from an early Pennsylvania case[20] decided in the period closely following the constitutional convention. This case placed an interpretation on cumulative voting that appears to agree with that of the *Wolfson* case. The question immediately arises as to where the Pennsylvania court would draw the line on allowing classification of directors or other corporate control devices to undermine the efficiency of the constitutional provision.[21] Struggles for corporate control will undoubtedly create future controversies in this area which will have to be resolved. Those states having a similar conflict between a statute and the state constitution should act to avoid the dilemma faced by the court here. This might be accomplished by either amending the constitution to allow classification of directors or repealing the classification statute altogether.

CORPORATIONS—OFFICERS—SECRETARY-TREASURER'S AUTHORITY TO INSTITUTE LITIGATION

The secretary-treasurer of plaintiff-corporation instituted litigation for conversion of corporate property. Although the by-laws of the corporation delegated the responsibility of general management to the board of directors, no board meetings were ever held and the secre-

18. The examples given by the court are "having a small board instead of a large number of directors, having longer terms for directors than merely one year, having vacancies on the board filled by the board itself as permitted by many statutes . . . , issuing non-voting stock or stock with limited voting rights, granting voting rights to bondholders or holders of preferred stock under certain conditions, granting unconditional voting privileges to preferred stock not previously enjoyed by it . . . ." 128 A.2d at 79. The court also pointed out that the defendant corporation was a public utility and the city appointed five of the company's twenty-one directors, leaving only sixteen directors for stockholder election.

19. The *Wolfson* case answers the problem thusly: "These fears are unwarranted. Corporate directors exercising the functions of their office under the color and claim of an election, even though unlawfully elected, are nevertheless *de facto* directors." 126 N.E.2d at 711.

20. Hays v. Commonwealth *ex. rel.* McCutcheon, 82 Pa. 518 (1876).

21. In Wright v. Central California Water Co., 67 Cal. 532, 8 Pac. 70 (1885), a majority of the stockholders approved a resolution to elect the company's seven directors at seven separate elections. This was held to be a violation of the California constitutional provision for cumulative voting since cumulation of votes would be impossible where there was only one director to elect.

tary-treasurer was in almost complete control of management affairs at the time of this action. Defendants contended that the suit was not properly brought because the corporate by-laws required majority consent of the directors for corporate action and the institution of litigation had not been authorized by the board. The trial court's denial of a motion to vacate the service of summons and complaint was upheld by the appellate division. On appeal, *held,* affirmed. A secretary-treasurer who has been acting as the general manager of a corporation may institute litigation without express authorization from the board of directors. *Rothman & Schneider, Inc. v. Beckerman,* 2 N.Y.2d 493, 141 N.E.2d 610 (1957).

Normally the authority of a corporate officer to act with reference to a particular matter is derived from express provisions of the corporate by-laws,[1] or from special resolution of the board of directors.[2] However, an officer may acquire implied authority to do certain acts beyond the scope of his express authority as a result of the acquiescence of the board of directors in his doing those acts over a period of time.[3] In addition to the authority that may originate from these sources, some cases have held that the president of a corporation may also have certain inherent authority that exists by virtue of the office.[4] Although a subordinate officer is generally regarded as a ministerial officer limited to the exercise of expressly delegated authority,[5] it has been held that such an officer may, under certain circumstances, acquire implied authority to do certain acts beyond the scope of his express authority.[6] Thus where a subordinate is

1. Jones v. Williams, 139 Mo. 1, 39 S.W. 486 (1897).

2. American Exchange Nat'l Bank v. Ward, 111 Fed. 782 (8th Cir. 1901); T. M. Gilmore & Co. v. W. B. Samuels & Co., 135 Ky. 706, 123 S.W. 271 (1909).

3. Arizona Southwest Bank v. Odam, 38 Ariz. 394, 300 Pac. 195 (1931); Moorhead v. Minneapolis Seed Co., 139 Minn. 11, 165 N.W. 484 (1917); Clucas v. Bank of Montclair, 110 N.J.L. 394, 166 Atl. 311 (1933).

4. Lydia E. Pinkham Medicine Co. v. Gove, 305 Mass. 213, 25 N.E.2d 332 (1940); Elblum Holding Corp. v. Mintz, 120 N.J.L. 604, 1 A.2d 204 (Sup. Ct. 1938); Warwick Sportswear Co. v. Simons, 4 Misc. 2d 482, 13 N.Y.S.2d 321 (Sup. Ct., App. T. 1939); Merchants' Nat'l Bank v. Eustis, 8 Tex. Civ. App. 350, 28 S.W. 227 (1894). To the effect that a president of a bank has inherent authority to initiate litigation, see Annots., 10 A.L.R.2d 701, 705 (1950), 67 A.L.R. 970, 978 (1930), 1 A.L.R. 693, 704 (1919). And that the president of a corporation has inherent authority to sue when the twofold purpose is to protect corporate assets and to counteract bad faith of other directors, see Annot., 10 A.L.R.2d 701, 707 (1950). For the proposition that a president lacks inherent authority to act outside of expressly delegated authority, see Pacific Bank v. Stone, 121 Cal. 202, 53 Pac. 634 (1898); Campbell v. Hanford, 67 Cal. App. 155, 227 Pac. 234, 237 (1924) (dictum); Ney v. Eastern Iowa Telephone Co., 162 Ia. 525, 144 N.W. 383 (1913); Jeanerette Rice & Milling Co. v. Durocher, 123 La. 160, 48 So. 780 (1909); Bright v. Metairie Cemetery Ass'n, 33 La. Ann. 58 (1881); Ashuelot Mfg. Co. v. Marsh, 55 Mass. (1 Cush.) 507 (1848).

5. People v. International Steel Corp., 102 Cal. App. 2d 935, 226 P.2d 587 (1951); Blackwell v. Saddleback Lumber Co., 129 Me. 270, 151 Atl. 534 (1930); Scott v. New York Filling Co., 79 N.J.L. 231, 75 Atl. 772 (Sup. Ct. 1910).

6. Moorhead v. Minneapolis Seed Co., 139 Minn. 11, 165 N.W. 484 (1917); Clucas v. Bank of Montclair, 110 N.J.L. 394, 166 Atl. 311 (1933).

general manager of the corporation and has customarily performed certain acts he may acquire such implied authority.[7] Under this view an extremely limited number of cases have held that a subordinate officer may acquire implied authority to initiate litigation where he is general manager of the corporation and has customarily initiated suit.[8]

In upholding the authority of a secretary-treasurer to initiate litigation in the instant case the court relied heavily upon the facts that the secretary-treasurer had been in general charge of the corporation during its active period[9] and, by agreement with the president, was to be in charge of the company's dissolution. Another consideration was that the secretary-treasurer had hired counsel to defend the corporation on prior occasions. These factors seem primarily responsible for the court's holding that implied authority had lodged in the secretary-treasurer, although some emphasis is placed upon the fact that the corporation was small and closely held,[10] there being only four shareholders, and the fact that the president was completely inactive in the management of the corporation. The court aptly points out that *Sterling Industries v. Ball Bearing Pen Corp.*,[11] holding that a president of a corporation lacked authority to initiate litigation, was not applicable,[12] and the court's rationale seems amply justified. The *Sterling* case is clearly distinguishable from the instant case because the *Sterling* case dealt with a situation in which the president of a corporation had requested approval to begin suit from a board of directors and failed to gain consent because of a split vote.[13] In the instant case two of the directors submitted affidavits that the institution of the suit was disfavored, but there was no evidence that the two had formally voted against its initiation.

The holding in the instant case is a burgeoning of the authority of

7. St. Louis, Ft. S. & W.R. Co. v. Grove, 39 Kan. 731, 18 Pac. 958 (1888); Barkin Constr. Co. v. Goodman, 221 N.Y. 156, 116 N.E. 770 (1917); Phillips v. Campbell, 43 N.Y. 271 (1870); Perry v. Council Bluffs City Waterworks Co., 67 Hun 456 (N.Y. Sup. Ct., Gen. T. 1893).

8. Bristol County Sav. Bank v. Keavy, 128 Mass. 298 (1880); Wintner v. Rosemont Realty Co., 195 Misc. 980, 91 N.Y. Supp. 452 (2d Dep't 1905); Whitman v. Koted Silk Underwear Co., 38 Misc. 796, 78 N.Y. Supp. 880 (New York City Ct. 1902).

9. "Schneider [the secretary-treasurer] was for all intents and purposes its general manager and executive head, undoubtedly with the full knowledge and acquiescence of the other stockholders and directors." Instant case, 141 N.E.2d at 613.

10. "It is to be borne in mind that we are dealing with a small closely held corporation, whose affairs were conducted without formality of any kind...." *Id.* at 614.

11. 298 N.Y. 483, 84 N.E.2d 790 (1949).

12. Instant case, 141 N.E.2d at 612.

13. For relevant material and cases collected on this point, See Notes, 18 FORDHAM L. REV. 133 (1949), 35 IOWA L. REV. 315 (1949), 52 HARV. L. REV. 321 (1938), 1949 U. ILL. L. FORUM 525, 5 U. PITT. L. REV. 44 (1938), 34 VA. L. REV. 715 (1948).

an officer beneath the rank of a president and allows a subordinate officer to exercise authority that was not contemplated in the corporate by-laws. It is unusual because it upholds the authority of a subordinate officer to initiate a suit, an action which is generally started at the instance of the president of the corporation.[14] It is interesting to note that no cases directly in point were cited as precedent for the court's decision. However, the cases cited do illustrate the proposition that a corporate officer may acquire "presumptive"[15] or implied[16] authority outside of the express authority delegated to him. A New York court has sustained a secretary-treasurer's authority to institute suit,[17] but no reference was made to this decision by the court in the instant case. In summary the court's extension of authority to the secretary-treasurer appears to be a logical conclusion when the full facts of his general managing practice are viewed with the conversely abstaining habits of the president and members of the board of directors.[18]

CORPORATIONS—SHAREHOLDER VOTING AGREEMENTS—APPLICABILITY OF VOTING TRUST STATUTE TO POOLING AGREEMENT GIVING IRREVOCABLE PROXIES TO REPRESENTATIVES OF SHAREHOLDERS

Plaintiff, a minority stockholder in a closely held corporation, sought a declaratory judgment[1] to declare invalid a stock pooling agreement, executed between the majority shareholders and eight individuals designated as "agents." Although the agreement was not intended to create a voting trust, the agents were given authority to transform it into a voting trust. These agents, comprising the majority of the

14. See note 1, *supra.*

15. Regal Cleaners & Dyers v. Merlis, 274 Fed. 915 (2d Cir. 1921); Lydia E. Pinkham Medicine Co. v. Gove, 305 Mass. 213, 25 N.E.2d 332 (1940); Elblum Holding Corp. v. Mintz, 120 N.J.L. 604, 1 A.2d 204 (Sup. Ct. 1938); Application of Bernheimer, 266 App. Div. 868, 43 N.Y.S.2d 300 (1943); Warwick Sportswear Co. v. Simons, 4 Misc. 2d 482, 13 N.Y.S.2d 321 (Sup. Ct. App. T. 1939).

16. A secretary has implied authority to contract for a corporation through general management practices. Barkin Constr. Co. v. Goodman, 221 N.Y. 156, 116 N.E. 770 (1917). A treasurer has implied authority to sign corporate promissory note when he generally manages business and has signed forty to fifty notes before. Perry v. Council Bluffs City Waterworks Co., 67 Hun 456 (N.Y. Sup. Ct., Gen. T. 1893).

17. Whitman v. Koted Silk Underwear Co., 38 Misc. 796, 78 N.Y. Supp. 880 (N.Y.C. Ct. 1902).

18. For discussion relevant to the instant case, see 2 N.Y.L.F. 429 (1956); 42 VA. L. REV. 679 (1956).

1. Prior to this action the corporation was preliminarily enjoined from recognizing any action taken at a board meeting at which two agents violated the agents' agreement. The two agents were similarly enjoined from such violation.

corporate directors,[2] represented on the board of directors the shareholders participating in the agreement. Under the agreement[3] the stockholders delivered their stock certificates with irrevocable voting proxies to their agents, who in turn deposited them in escrow for the term of the agreement. Although the shareholder retained an indirect right to control the voting of his stock,[4] his wishes could be defeated by the decision of seven of the agents or by an arbitrator in the event at least seven of the agents could not agree. The lower court found that the agreement was not a voting trust but was rather a valid pooling agreement.[5] On appeal, *held,* reversed. A shareholders' voting agreement in which the voting right is divorced from the beneficial ownership through the medium of irrevocable proxies for a period of ten years is a voting trust and thus is invalid if it fails to comply with the requirements of the voting trust statute.[6] *Abercrombie v. Davies,* 130 A.2d 338 (Del. Sup. Ct. 1957).

Stockholders owning voting stock may exercise their voting power pursuant to an agreement[7] with other shareholders,[8] and, unless such agreements contemplate fraud[9] on other shareholders the courts will

2. At all times the number of directors has been fifteen.

3. In substance the applicable provisions of the agents' agreement were as follows: Paragraph 1. Shareholders will deliver to the agents the certificates of stock owned by them and receive proper receipt for all certificates so delivered. The certificates and stock power are to be deposited in escrow subject to withdrawal at any time by any seven of the agents. . . .
Paragraph 3. Shareholders shall deliver to the agents and shall keep in effect proxies for the term of this agreement giving the agents power to vote for any act or proceeding which the shareholders themselves could vote for. The vote shall be exercised as a unit as any seven of the agents shall determine. If any seven agents shall fail to agree then the question in disagreement shall be submitted for arbitration to some disinterested person.
Paragraph 4. Each shareholder has the right to remove its agent at any time without cause. . . .
Paragraph 6. The proxies are to be irrevocable for a period of ten years.
Paragraph 7. Any seven of said agents may at any time withdraw said stock certificates from escrow and transfer said stock to the persons then acting as agents, as trustees to be held under a voting trust. See Instant Case, 130 A.2d at 342-43.

4. The stockholder can direct his agent how to vote on a decision to be made by the agents as a group. *Id.* at 346.

5. The usual definition of a voting agreement is a contract among two or more stockholders whereby they retain not only the legal and beneficial ownership of their shares, but also their right to vote them, and merely agree to vote all their combined stock as a unit in some predetermined way to accomplish some corporate purpose. Note, 3 U. CHI. L. REV. 640, 641 (1936).

6. DEL. CODE ANN. tit. 8, § 218 (1953). The parties to the agreement had not transferred the stock on the corporate books and had not filed a copy of the agreement in the corporation's principal office as required by the statute.

7. Smith v. San Francisco & N.P. Ry., 115 Cal. 584, 47 Pac. 582 (1897) (voting pool); Groub v. Blish, 88 Ind. App. 309, 152 N.E. 609 (1926) (proxy agreement).

8. Memphis & C.R.R. v. Wood, 88 Ala. 630, 7 So. 108 (1889).

9. Moses v. Scott, 84 Ala. 608, 4 So. 742 (1888) (illegal restraint on alienation of stock); People v. Burke, 72 Colo. 486, 212 Pac. 837 (1923) (irrevocable voting agreement); Shepaug Voting Trust Cases, 60 Conn. 553, 24 Atl. 32 (1890) (contravention of statutes providing no proxy shall be voted after a certain length of time).

generally declare them valid.[10] Such agreements are distinct from voting trusts and are not subject to the same principles.[11] The voting trust involves a more complete surrender of control over the stock owned by the shareholders than any other control agreement.[12] By it the shareholder may be deprived not only of any right to vote for directors but also of any voice in management decisions.[13] The voting trust is considered to be a true trust.[14] Thus, it is held that voting trustees are subject to the usual fiduciary duties to certificate holders.[15] In the absence of a statute[16] authorizing voting trusts, some courts would declare an agreement which separates the beneficial ownership of the stock from the legal title invalid per se as contrary to public policy.[17] Recent cases, however, demonstrate a trend to uphold them if formed for a lawful purpose and capable of being executed in a lawful manner.[18]

The instant case illustrates the problem encountered by shareholders who enter into contracts to bind each other as to how they will vote their stock. Courts that have considered the problem of enforcing these contracts have reached diverse results. In *Ringling Bros.-Barnum and Bailey Combined Shows v. Ringling*[19] an agreement between two shareholders to act jointly in exercising voting rights and to abide by an arbitrator's decision in the event of an impasse was held not to be a voting trust but to be a valid stock pooling agreement.[20] However, specific performance was not granted because there was no grant of power in either party to exercise the voting rights of the other. In *Smith v. San Francisco & N.P. Ry.*,[21] three persons purchased stock under an agreement that the stock should be voted in one block as determined by a ballot among themselves. The court found the contract contained an implied proxy, irrevocable because coupled with an interest, and specific performance was granted since the irrevocable

10. E. K. Buck Retail Stores v. Harkert, 157 Neb. 867, 62 N.W.2d 288 (1954).
11. 5 FLETCHER, PRIVATE CORPORATIONS § 2064 (perm. ed. rev. repl. 1952).
12. BALLANTINE, CORPORATIONS § 184b (1946).
13. *Ibid.*
14. See Gose, *Legal Characteristics and Consequences of Voting Trusts,* 20 WASH. L. REV. 129, 131 (1945).
15. Brown v. McClanahan, 148 F.2d 703 (4th Cir. 1945); Wool Growers Service Corp. v. Ragan, 18 Wash. 2d 655, 140 P.2d 512 (1943).
16. More than twenty states are listed as having voting trust statutes, in 5 FLETCHER, PRIVATE CORPORATIONS § 2080.1 (perm. ed. rev. repl. 1952).
17. Sheppard v. Rockingham Power Co., 150 N.C. 776, 64 S.E. 894 (1909); Harvey v. Linville Implement Co., 118 N.C. 693, 24 S.E. 489 (1896). See also opinion of Pitney, J., in Warren v. Pim, 66 N.J. Eq. 353, 59 Atl. 773, (Ct. Err. & App. 1904).
18. Gumbiner v. Alden Inn, Inc., 389 Ill. 273, 59 N.E.2d 648 (1945); Redman v. Minnis, 43 Ohio App. 371, 183 N.E. 299 (1932).
19. 29 Del. Ch. 610, 53 A.2d 441, (Sup. Ct. 1947).
20. The court felt the voting trust statute did not purport to include an agreement whereby parties bind each other as to how they vote their shares as long as they retain legal title to their own shares and have no power to vote the shares of the other party. *Id.* at 447.
21. 115 Cal. 584, 47 Pac. 582 (1897).

proxy gave each party the right to vote the stock of the other. In the instant case the court found that an agreement which separated voting power from the other attributes of stock ownership through the medium of fiduciaries with irrevocable proxies was, in substance, a voting trust. As such, it was void for failing to comply with the requirements of the voting trust statute.

To include the present agreement in the modern conception of a voting trust is unusual because each agent was subject to some control by his respective stockholder-principal;[22] and, furthermore, the fact that the agents did not retain individual control over the stock while deposited in escrow[23] would seem to deny the conclusion that legal title vested in the agents. However, the opinion indicates that an important factor which enabled the court to reach its decision was that the agreement itself gave the agents the power to transform the agreement into a voting trust. And, with the Delaware voting trust statute[24] as an aid to the court had little difficulty in declaring the present agreement a voting trust. The scope of the statute seems to include agreements generally not considered to be voting trusts[25] since it is designed to place restrictions[26] on all agreements whereby stockholders transfer stock and vest voting control, though not necessarily legal title, in a trustee. The position taken by the court may be rationalized as an attempt to encourage the use of the statutory voting trust and thereby avoid the uncertainty and litigation surrounding non-statutory voting schemes.

CRIMINAL LAW—DEFENSES—REJECTION OF THE DURHAM RULE AS THE TEST OF INSANITY

Defendant, relying on insanity as a defense, was convicted of entering a national bank with the intent to commit larceny.[1] The trial court instructed the jury on the issue of insanity in terms of the

22. See note 4 *supra*.

23. The stock could not be withdrawn from escrow unless seven of the eight agents agreed to such withdrawal.

24. DEL. CODE ANN. tit. 8, § 218 (1953).

25. "The modern voting trust, especially one formed under statutes enacted in several states, transfers to and vests in the trustees the stock and the legal title to it, and the stockholders receive voting trust certificates in lieu of their holdings so transferred." Barney v. First National Bank, 90 P.2d 584 (Cal. App. 1939), quoting 5 FLETCHER, PRIVATE CORPORATIONS § 2075 (perm. ed. rev. repl. 1952).

26. Restrictions contained in the statute are: (1) agreement shall not exceed ten years, (2) a copy of the agreement must be filed in the principal office of the corporation in the State of Delaware, (3) shares issued pursuant to such agreement must be transferred on the books of the corporation. DEL. CODE ANN. tit. 8, § 218 (1953).

1. 18 U.S.C. § 2113 (1952).

"right and wrong" test and the "irresistible impulse" test. On appeal, the defendant contended that the trial court erred in failing to instruct the jury that the accused is not criminally responsible if his unlawful act was the product of mental disease.[2] *Held,* affirmed. Knowledge of right and wrong as developed by *M'Naghten's Case*[3] is still the basic test for criminal responsibility in the federal courts. *Sauer v. United States,* 241 F.2d 640 (9th Cir. 1957).

Various tests for criminal responsibility have been developed to assist the jury since the courts first began to recognize that punishment of criminal acts should be mitigated for persons of unsound mind.[4] The rule which arose from the famous *M'Naghten's Case* has become the basic criterion for criminal responsibility in most of the common law jurisdictions.[5] That is, the accused will not be held criminally responsible if he was unable to distinguish between right and wrong at the time of the offense.[6] Several courts, feeling this test to be inadequate, have supplemented it with the rule that a defendant should not be held criminally responsible if his act was the result of an irresistible impulse.[7] Though both tests have been the subject of intense criticism,[8] they have long been the rule in the federal courts.[9] Recently, however, one court found both tests inadequate as an exclusive criterion and adopted a much broader approach to the problem, which has become known as the *Durham* Rule, under which the jury is instructed that "the accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect."[10]

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2. The requested instructions are in accordance with the rule announced in Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954).

3. 10 Cl. & Fin. 200, 8 Eng. Rep. 718 (H.L. 1843).

4. For extensive historical background on the various tests, see BIGGS, THE GUILTY MIND 81-117 (1955); WEIHOFEN, MENTAL DISORDER AS A CRIMINAL DEFENSE 50-174 (1954).

5. Leland v. Oregon, 343 U.S. 790 (1952); Bryant v. State, 207 Md. 565, 115 A.2d 502 (1955); in general, see Annot., 45 A.L.R.2d 1447, 1452 (1956).

6. "[T]o establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong." 8 Eng. Rep. at 722.

7. "If, by reason of the duress of such mental disease, he had so far lost the *power to choose* between the right and wrong, and to avoid doing the act in question, as that his free agency was at the time destroyed . . . ." Parsons v. State, 81 Ala. 577, 2 So. 854, 866 (1887). See Annot., 45 A.L.R.2d 1447, 1453 (1956).

8. See CARDOZO, LAW AND LITERATURE *passim* (1931); GLUECK, MENTAL DISORDER AND THE CRIMINAL LAW *passim* (1925); GUTTMACHER and WEIHOFEN, PSYCHIATRY and THE LAW *passim* (1952); WEIHOFEN, THE URGE TO PUNISH *passim* (1956); ZILBOORG, MIND, MEDICINE AND MAN *passim* (1943).

9. Davis v. United States, 165 U.S. 373 (1897); Howard v. United States, 232 F.2d 274 (5th Cir. 1956).

10. Durham v. United States 214 F.2d 862, 874 (D.C. Cir. 1954). This is essentially the same position as that taken by New Hampshire as early as 1870 in State v. Pike, 49 N.H. 399 (1870).

The instant case illustrates how reluctant both the federal and state courts have been to follow the test suggested by the *Durham* case[11] though it has been hailed with great enthusiasm by legal writers and psychiatrists.[12] The instant court states several reasons why it will not adopt a new approach to insanity. The first of these is the possibility that the defendant might avoid both the jail and the asylum under existing federal procedure, which does not provide for commitment after the jury verdict.[13] The second is the Supreme Court's apparent approval of the *M'Naghten* test in cases which it has considered.[14] The third reason seems to be the apprehension of the increased responsibility which would have to be delegated to the jury and the increased reliance upon psychiatric testimony under the *Durham* approach.[15] The final reason is the indefiniteness of the word "product" used in the instructions to the jury in the *Durham* case.[16]

Under the conditions created by the lack of any uniform federal procedure for commitment proceedings after the verdict, the court's reasoning in the instant case appears sound. However, it is sub-

11. Other jurisdictions which have rejected the *Durham* "product" test are: Andersen v. United States, 237 F.2d 118 (9th Cir. 1956) (cited as controlling in the instant case); Howard v. United States, 232 F.2d 274 (5th Cir. 1956); United States v. Kunak, 5 U.S.C.M.A. 346, 17 C.M.R. 346 (1954); People v. Carpenter, 11 Ill. 2d 60, 142 N.E.2d 11 (1957); Flowers v. State, 139 N.E.2d 185 (Ind. 1956); Bryant v. State, 207 Md. 565, 115 A.2d 502 (1955); State v. Kitchens, 286 P.2d 1079 (Mont. 1955); State v. Goyet, 132 A.2d 623 (Vt. 1957); State v. Collins, 314 P.2d 660 (Wash. 1957).

12. For approval of the *Durham* rule, see Douglas, *The Durham Rule: A Meeting Ground for Lawyers and Psychiatrists*, 41 IOWA L. REV. 485 (1956); Roche, *Criminality and Mental Illness—Two Faces of the Same Coin*, 22 U. CHI. L. REV. 320 (1955); Zilboorg, *A Step Toward Enlightened Justice*, 22 U. CHI. L. REV. 331 (1955). For criticism of the rule, see Wertham, *Psychoauthoritarianism and the Law*, 22 U. CHI. L. REV. 336, 337 (1955).

The alternative tests proposed in the Model Penal Code apparently have abandoned the *M'Naghten* rule for a more liberal rule allowing the jury to determine what is and what is not sufficient evidence of insanity; or whether the accused should be held responsible for his act. See, Sobeloff, *Insanity and The Criminal Law: From McNaghten to Durham, and Beyond*, 41 A.B.A.J. 793, 878 (1955).

13. "The defense of insanity comes under the "not guilty" plea, and the jury is not required to state specifically its ground for acquittal. Thus there is no way for the Government to determine the basis of the jury verdict. It therefore sets the accused free." 241 F.2d at 651.

14. "The Supreme Court thus at least tacitly approved the test as being either incapacity (resulting from some mental disease or defect) to distinguish between right and wrong with respect to the act, or, although able to so distinguish, the inability to refrain from committing the act." *Id.* at 643.

15. "One evident consequence of the Durham decision is to shift the entire question of criminal responsibility to the jury. . . . It is the function of the court to develop a standard of criminal responsibility . . . ." *Id.* at 646.

"[T]he solution may better lie, not in the layman accommodating the specialist, but rather in the adjustment by the specialist of his technical vocabulary to the language of the layman." *Id.* at 647.

16. "If the word means that the jury must find that the accused would have committed the act even if he had not suffered from the abnormality involved, the test is too broad. If the test is, . . . one of causation, then the court is introducing into an area already burdened with serious problems a concept which has plagued the law of torts since its inception." *Ibid.*

mitted that the choice between the two tests discussed does not involve a basic revision in our concept of criminal responsibility as suggested in the instant court's conclusion.[17] We have progressed slowly towards recognizing that detention and treatment of the mentally sick, rather than imprisonment, will go further towards protecting our public safety.[18] It appears that a large part of the courts' hesitation to apply the *Durham* rule is due to their reluctance to deprive themselves of the control they now have under the traditional tests. It is submitted that the *Durham* rule is the better psychological approach to the problem of legal insanity, but perhaps only through proper legislation will it be accepted by the courts as an advancement in the field of criminal law.

EVIDENCE—ADMISSIBILITY— RES JUDICATA IN CRIMINAL ACTIONS

Defendant was indicted for conspiring to violate the Internal Revenue Code by engaging in the business of a distiller without paying taxes thereon.[1] One of the overt acts allegedly committed in furtherance of the conspiracy was the joint possession by defendant and two others of an unregistered distillery. As proof of possession, the Government offered the testimony of an Internal Revenue agent to the effect that he had seen the defendant running away from a house wherein an illegal still was found. The week preceding the conspiracy trial, defendant had been acquitted by a jury of a substantive charge of possession[2] of the identical still at the identical time and place. The same testimony of the agent had been offered and admitted in this prior prosecution. The judge in the conspiracy trial admitted the agent's testimony and the jury found defendant guilty. On appeal, *held,* reversed. The doctrine of res judicata bars the relitigation of the fact of possession previously determined by the acquittal of de-

17. *Id.* at 652. It should be noted that the Circuit Court of Appeals for the District of Columbia recently pointed out that the *Durham* approach did not prevent all use of the "right and wrong" and "irresistible impulse" tests. "[W]e did not purport to bar all use of the older tests: testimony given in their terms may still be received if the expert witness feels able to give it, and where a proper evidential foundation is laid a trial court should permit the jury to consider such criteria in resolving the ultimate issue 'whether the accused acted because of a mental disorder.'" Douglas v. United States, 239 F.2d 52, 58 (D.C. Cir. 1956). See also, Stewart v. United States, 247 F.2d 42, 44 (D.C. Cir. 1957).

18. See Sobeloff, *supra* note 12, at 879.

1. 62 STAT. 701 (1948), 18 U.S.C. § 371 (1952) (general conspiracy statute); INT. REV. CODE OF 1954, § 5005 (levy of tax upon distiller).

2. INT. REV. CODE OF 1954, §§ 5174, 5601.

fendant on the substantive charge. *Yawn v. United States*, 244 F.2d 235 (5th Cir. 1957).

Preliminarily, it is necessary to distinguish the application of the doctrines of double jeopardy and res judicata in criminal cases. The former prohibits *in toto* twice subjecting one to trial for the same offense.[3] The latter prevents relitigating in a subsequent proceeding between the same parties issues of fact or law previously determined in the former suit, though the actions be different.[4] The Supreme Court of the United States seems to have sanctioned the applicability of res judicata in criminal cases before the federal courts,[5] and it has been applied not infrequently.[6] The doctrine's applicability has become extremely important because of the increasing complexity of statutory criminal law wherein one criminal act may give rise to successive prosecutions for separate offenses based on the same act.[7] The constitutional prohibition of double jeopardy[8] cannot be properly invoked by a defendant in such situations because of the requirement of identity of offenses.[9] Although some courts have either intention-

3. "The prohibition of the Constitution is against a second jeopardy for the 'same offense'; that is, for the identical crime. The offenses charged in the two prosecutions must be the same in law and fact." United States v. Halbrook, 36 F. Supp. 345, 351 (E.D. Mo. 1941). Perhaps the leading case on double jeopardy is Coffey v. United States, 116 U.S. 436 (1886).

4. This application of res judicata is commonly termed "collateral estoppel" and is the terminology adopted by the RESTATEMENT, JUDGMENTS § 68 (1942). For excellent treatments of the doctrine in general, see Scott, *Collateral Estoppel By Judgment*, 56 HARV. L. REV. 1 (1942); von Moschzisker, *Res Judicata*, 38 YALE L. J. 299 (1928); *Developments in the Law—Res Judicata*, 65 HARV. L. REV. 818 (1952).

5. Sealfon v. United States, 332 U.S. 575 (1948); United States v. Oppenheimer, 242 U.S. 85 (1916); *cf.* United States v. Adams, 281 U.S. 202 (1930). State courts have generally accepted res judicata in criminal cases. See *e.g.*, Mitchell v. State, 140 Ala. 118, 37 So. 76 (1904); Harris v. State, 193 Ga. 109, 17 S.E.2d 573 (1941); Commonwealth v. Spivey, 243 Ky. 483, 48 S.W.2d 1076 (1932); People v. Kleinman, 168 Misc. 920, 6 N.Y.S.2d 246 (Sup. Ct. 1938). See also Annot., 147 A.L.R. 991 (1943).

6. Sealfon v. United States, 332 U.S. 575 (1948); United States v. Simon, 225 F.2d 260 (3d Cir. 1955); Cosgrove v. United States, 224 F.2d 146 (9th Cir. 1954); United States v. De Angelo, 138 F.2d 466 (3d Cir. 1943); United States v. Bower, 95 F. Supp. 19 (E.D. Tenn. 1951); United States v. Carlisi, 32 F. Supp. 479 (E.D.N.Y. 1940); see Annot., 147 A.L.R. 991 (1943).

7. See Kirchheimer, *The Act, The Offense and Double Jeopardy*, 58 YALE L. J. 513 (1949). It is well established in the federal courts that the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses. Pinkerton v. United States, 328 U.S. 640 (1946); Braverman v. United States, 317 U.S. 49 (1942); United States v. Rabinowich, 238 U.S. 78 (1915); Note, 37 ILL. L. REV. 183 (1942).

8. U.S. CONST. amend. V and all but five state constitutions (Connecticut, Maryland, Massachusettes, North Carolina, Vermont) prohibit double jeopardy.

9. Joplin Mercantile Co. v. United States, 236 U.S. 531 (1915) (acquitted of substantive offense and later convicted of conspiracy to commit the same offense); Westfall v. United States, 20 F.2d 604 (6th Cir. 1927) (convicted of substantive crime and then convicted of conspiracy); Louie v. United States, 218 Fed. 36 (9th Cir. 1914) (acquitted of conspiracy and convicted of aiding and abetting). The usual test for determining whether offenses are the same is the "same evidence test." Morgan v. Devine, 237 U.S. 632, 641 (1914); Carter v. McClaughry, 183 U.S. 365, 395 (1902). For a discussion of

ally or unintentionally applied the double jeopardy prohibition to a later prosecution for a separate offense,[10] the sounder and more consistent approach is the use of res judicata. Most of the difficulty and confusion which presently exists concerns the question of just which facts involved in the former action should be deemed determined by that action and therefore conclusive in a subsequent proceeding.[11] Some courts require only that the fact have been in issue and have been necessary to the result.[12] Other courts further distinguish between "ultimate" and "mediate" facts,[13] holding that only facts "ultimate" in the first suit are conclusive in the second.[14] The leading case of *Sealfon v. United States*[15] seems to indicate that the trial court should look to the former record, paying particular attention to the instructions given there, to determine which issues are not open to litigation in the second prosecution.[16]

The court in the instant case holds that the Government may not relitigate in the conspiracy trial "the precise fact of possession" decided in the former prosecution by a general verdict of acquittal.[17] As a requisite to applying res judicata the court requires only that the fact have been previously determined in the former trial. In the first prosecution the agent's testimony was intended to serve as a basis from which the jury might infer the ultimate fact of possession. In the subsequent conspiracy prosecution the testimony was offered for exactly the same purpose. The court concludes that to admit the testimony would be to allow the relitigation of the possession issue undoubtedly determined previously by defendant's acquittal.[18] This

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this and other tests employed, see Comment, 38 J. CRIM. L. & CRIMINOLOGY 379 (1947).

10. Carson v. People, 4 Colo. App. 463, 36 Pac. 551 (1894); State v. Wheelock, 216 Iowa 1428, 250 N.W. 617 (1933); Spannell v. State, 83 Tex. Crim. 418, 203 S.W. 357 (1918); Note, 7 BROOKLYN L. REV. 79, 90-93 (1937).

11. See Rothschild, *Res Judicata and Collateral Attack as Phases of Judicial Estoppel*, 7 BROOKLYN L. REV. 271, 283-94 (1938).

12. Southern Pac. Ry. v. United States, 168 U.S. 1 (1897); United States v. De Angelo, 138 F.2d 466 (3d Cir. 1943); Dobbins v. Title Guarantee & Trust Co., 22 Cal. 2d 64, 136 P.2d 572 (1943); Wright v. Griffey, 147 Ill. 496, 35 N.E. 732 (1893). 2 FREEMAN, JUDGMENTS § 693 (5th ed. 1925) apparently is in accord with this view.

13. "[A] 'fact' may be of two kinds. It may be one of those facts, upon whose combined occurrence the law raises the duty, or the right, in question; or it may be a fact, from whose existence may be rationally inferred the existence of [an ultimate fact] . . . . The first kind of fact we shall for convenience call an 'ultimate' fact; the second, a 'mediate datum.'" Per Judge Learned Hand in The Evergreens v. Nunan, 141 F.2d 927, 928 (2d Cir. 1944).

14. The Evergreens v. Nunan, *supra* note 13; Campbell v. Milliken, 20 Colo. App. 299, 78 Pac. 620 (1904); Louisville Gas Co. v. Kentucky Heating Co., 132 Ky. 435, 111 S.W. 374 (1908); King v. Chase, 15 N.H. 9 (1844).

15. 332 U.S. 575 (1948).

16. *Cf.* Emich Motors Corp. v. General Motors Corp., 340 U.S. 558 (1951). In the instant case, neither the indictment nor the record of the former trial were offered by defendant's counsel. 244 F.2d at 236 n.1.

17. *Id.* at 237.

18. The court says that to give "possession" as litigated in the first trial

conclusion is favorably supported by *United States v. De Angelo*,[19] a very similar case decided by the Court of Appeals for the Third Circuit, upon which this court puts considerable reliance.[20]

The already difficult question of which issues have been previously determined is amplified where, as here, the former trial results in a general jury verdict.[21] Indeed, in some cases res judicata has not been applied because it was impossible to determine which issues were decided by a former general verdict of acquittal.[22] The question in the instant case was not whether the former acquittal decided either that defendant did not run away from the house where a still was found or that no still was there. The verdict decided only that a reasonable doubt existed as to defendant's possession of an illegal still. Yet to allow the jury in the conspiracy trial to draw the same inference of possession from the same testimony previously employed in the former trial is clearly contrary to the principles of res judicata. If the testimony were admitted in the conspiracy trial, the jury there would be called upon to determine the identical fact with the same degree of certainty, *viz.*, reasonable doubt, that the former verdict determined.[23] This is not to say that the testimony would be inadmissible for all purposes. If offered for some other relevant purpose such as the identification of defendant with the conspiracy and accompanied by limiting instruction, it might well have been properly admissible. But the prosecutor made it clear to the trial judge here that the testimony was offered solely for the purpose of proving the

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any different legal meaning from "possession" as litigated in the second would be an unwarranted "exercise in semantics." 244 F.2d at 237-38.

19. 138 F.2d 466 (3d Cir. 1943).

20. In United States v. De Angelo, *supra* note 19, defendant was convicted with others for conspiring to commit a robbery. A former prosecution of defendant on a substantive charge of robbery had resulted in defendant's acquittal. The court held that the prosecution was estopped from relitigating in the conspiracy trial the facts of defendant's presence and participation in the robbery previously in issue and determined by the former verdict of acquittal. The admission in the conspiracy trial of some of the same evidence used by the prosecution as proof of these facts in the former trial was held to be reversible error. But since the prosecution in the second trial relied on some other evidence than that used in the first trial and which might be sufficient to support a conviction for conspiracy, the court did not dismiss the case, but granted a new trial. The same procedure as to disposition of the case was employed by the court in the instant case.

21. A difficulty which obviously might be minimized to some extent by the more frequent use of special verdicts and findings of fact.

22. *E.g.*, United States v. Dockery, 49 F. Supp. 907 (E.D.N.Y. 1943); United States v. Halbrook, 36 F. Supp. 345 (E.D. Mo. 1941); State v. Erwin, 101 Utah 365, 120 P.2d 285 (1941).

23. One of the primary reasons for the general holding that a criminal judgment is not determinative of any issue in a later civil proceeding other than the fact of its rendition, is the difference in degrees of pursuasion required in the two proceedings. See *e.g.*, Horn v. Cole, 203 Ark. 361, 156 S.W.2d 787 (1941); Harper v. Blasi, 112 Colo. 518, 151 P.2d 760 (1944). See also 2 FREEMAN, JUDGMENTS §§ 653-56 (5th ed. 1925).

fact of possession.[24] So offered, the result reached in the instant case is unquestionably sound.

FEDERAL JURISDICTION AND PROCEDURE—MANDAMUS—APPELLATE REVIEW OF INTERLOCUTORY ORDER

Petitioner, a United States district judge, referred antitrust cases[1] to a master for trial,[2] over objections of all parties. After petitioner denied motions to vacate the orders,[3] petitions for writs of mandamus were filed in the court of appeals, seeking to force petitioner to vacate the orders. Although petitioner contended that courts of appeals do not have the power to issue such writs to review interlocutory orders unless review on appeal after final judgment would be frustrated, the writs were granted.[4] *Held* (5-4), affirmed. The court of appeals has the power, in exceptional cases, to entertain a petition for a writ of mandamus to review unauthorized interlocutory orders, in advance of final judgment. *La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957).

Generally, Congress has limited review by the federal appellate courts to final decisions of the trial court,[5] thus continuing a policy[6]

24. "The Court: The court understands, Mr. District Attorney, the testimony is offered for the purpose of establishing the ninth alleged overt act [possession] of the charge in this case?
"Mr. Madsen: That is correct." 244 F.2d at 237-38 n.2.

1. Rohlfing v. Cat's Paw Rubber Co., 17 F.R.D. 426 (N.D. Ill. 1954), Shaffer v. U.S. Rubber Co., 99 F. Supp. 886 (N.D. Ill. 1951).

2. The reference was made pursuant to FED. R. CIV. P. 53(b), which provides: "(b) Reference. A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account, a reference shall be made only upon a showing that some exceptional condition requires it." For a general discussion of this rule, see 5 MOORE, FEDERAL PRACTICE ¶ 53.05 (Supp. 1956).

3. The motions were made by all parties to the action.

4. Howes Leather Co. v. La Buy, 226 F.2d 703 (7th Cir. 1955), *cert. granted*, 350 U.S. 964 (1956), 65 YALE L.J. 1057 (1956).

5. "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court." 28 U.S.C. § 1291 (1952).

6. This policy has been firmly entrenched by judicial precedent:
"Finality as a condition of review is an historic characteristic of federal appellate procedure. It was written into the first Judiciary Act and has been departed from only when observance of it would practically defeat the right to any review at all. . . ." Cobbledick v. United States, 309 U.S. 323, 324 (1940). See, *e.g.*, Catlin v. United States, 324 U.S. 229, 233 (1945); United States Alkali Export Ass'n v. United States, 325 U.S. 196, 202 (1945); *In re* Chapel & Co., 201 F.2d 343 (1st Cir. 1953). For a general discussion of the final judgment rule, see 6 MOORE, FEDERAL PRACTICE, ¶ 54.04 (Supp. 1956); Crick, *The Final Judgment Rule as a Basis For Appeal*, 41 YALE L.J. 539 (1932); Porter, *Appeals from Interlocutory and Final Decrees in the U.S. Circuit Courts of Appeal*, 19 B.U.L. REV. 377 (1939); Notes, *The Final Judgment Rule in the Federal Courts*, 47 COLUM. L. REV. 239 (1947), *The Writ of Mandamus: A Possible Answer to the Final Judgment Rule*, 50 COLUM. L. REV. 1102 (1950).

enunciated in the first Judiciary Act.[7] Congress has, however, provided for appeals from certain enumerated interlocutory orders.[8] It has further increased appellate review by the All Writs Act,[9] under which the federal courts may issue all writs necessary in aid of their jurisdiction.[10] This "aid of jurisdiction" requirement has placed a limitation upon the use of the prerogative writs, beyond which the courts have not ventured.[11] In *Roche v. Evaporated Milk Ass'n*,[12] the Supreme Court announced, as one of three propositions,[13] that the prerogative writs may not be used as a substitute for appeal.[14] The *Roche* case presents a clear example of how use of the prerogative writs has been severely circumscribed by the firmly entrenched final judgment rule.[15]

The Court in the instant case stated that as the court of appeals could, at some stage of the proceedings, entertain an appeal, it had power to issue writs of mandamus reaching the cases, as the exceptional circumstances present warranted the use of the writ. The Court warned, however, that this conclusion could not be taken to be an authorization for the indiscriminate use of prerogative writs as a

7. § 22, 1 STAT. 72 (1789).

8. 28 U.S.C. § 1292 (1952). Section 1292 confers upon courts of appeals jurisdiction of appeals from interlocutory orders of the district courts, relating to injunctions, receivership, and certain admiralty and patent infringement cases.

9. "(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a) (1952).

10. Provided, however, there is no clear congressional policy against any appellate review of a particular type of order, in which case that type is not reviewable through the medium of a writ. See Kloeb v. Armour & Co., 311 U.S. 199 (1940) (remand order).

11. The traditional use of the writ of mandamus has been limited to those cases where the action of the district court tended to frustrate or impede the ultimate exercise by the court of appeals of its appellate jurisdiction or to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it was its duty to do so. See Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 26 (1943); *Ex Parte* Peru, 318 U.S. 578, 582 (1943); Maryland v. Soper, 270 U.S. 9, 29 (1926); *In re* Josephson, 218 F.2d 174 (1st Cir. 1954). As extraordinary remedies, the writs are reserved for extraordinary cases, as where judges of a district court were persistently violating rules of practice promulgated by the Supreme Court. McCullough v. Cosgrave, 309 U.S. 634 (1940) (mandamus granted to vacate reference to a master, since reference under 53(b) is to be the exception). This was a per curiam decision, which was explained in Roche v. Evaporated Milk Ass'n, *supra*. See Los Angeles Brush Mfg. Corp. v. James, 272 U.S. 701 (1927) (mandamus, but not granted, although the Court indicated that it would enforce a provision in the equity rule comparable to 53(b)).

12. 319 U.S. 21 (1943).

13. The remaining propositions were: 1. The All Writs Act does not limit the issuance of a writ to a case where appellate jurisdiction has already attached; 2. On an application for a writ the question is one of propriety, not power. Roche v. Evaporated Milk Ass'n, *supra* note 11; cf. *Ex Parte* Peru, 318 U.S. 578 (1943); *Ex Parte* United States, 287 U.S. 241 (1932); McCelland v. Carland, 217 U.S. 268, 280 (1910).

14. 319 U.S. at 26; see Maryland v. Soper, 270 U.S. 9, 29 (1926).

15. 319 U.S. at 30.

means of reviewing interlocutory orders, as mandamus should be resorted to only in extreme cases.[16] The exceptional circumstance found to exist here, bringing this case into the restricted area wherein the use of the extraordinary writs is allowed, was the "clear abuse of discretion" by the district judge in his reference of the cases to a master, which action amounted to little less than depriving the parties of their right to a trial before the court. The fact that the calendar was congested, plus the unusual complexity of the cases, and the great length of time required for trial did not amount to such an exception as to justify the reference, in view of petitioner's knowledge of the instant cases at the time of the reference and his long experience in the antitrust field, as such reference is to be "the exception and not the rule."[17] Although there was no action by the district court which tended to frustrate or defeat appellate review of the ruling upon final judgment, a fact which in the *Roche* case was considered a basis for refusing the issuance of the writ,[18] the Court interpreted the All Writs Act as conferring on the courts of appeals the discretionary power to issue writs of mandamus in the exceptional circumstances which existed here.[19]

The Court here has refused to continue a rigid policy of finality, and has used the writ of mandamus to review an interlocutory order without doing substantial violence to the final judgment rule. Granted that the traditional jurisdictional requirement has been loosened, the limitation of the writs to "exceptional cases" indicates that the term will not be considered an elastic one, at least for the present, although it is likely to become as hazy and ill-defined as the "jurisdiction" and "final judgment" requirements have in the past.[20] Not resting its

16. 352 U.S. at 255.

17. The Court cited Los Angeles Brush Mfg. Corp. v. James, 272 U.S. 701 (1927), and McCullough v. Cosgrave, 309 U.S. 634 (1940), see note 11, *supra*. In *James* the Court considered a congested calendar as a good basis for a reference; *McCullough* cited only *James*. The dissent in the instant case attacks the reliance upon these cases, stating that neither can be accepted as supporting the action of the court of appeals here. In both the former cases the Court was concerned with the enforcement of the equity rules "which it is the duty *of this court to formulate and put in force.*" 352 U.S. at 266 (Emphasis added by Court.) The dissent cited *In re* Josephson, 218 F.2d 174, 179 (1st Cir. 1954), to the effect that the Supreme Court might have been exercising a different sort of power from the strictly auxiliary power given the courts of appeals by the All Writs Act. 352 U.S. at 265.

18. 319 U.S. at 26 (1943).

19. In a strong dissent, Mr. Justice Brennan states that the Court, by its decision in the instant case, has seriously undermined the long-standing policy against piecemeal appeals, by its interpretation of the All Writs Act as conferring "an independent appellate power in the Courts of Appeals to review interlocutory orders. . . ." thereby engrafting upon federal appellate procedure a new standard of interlocutory review, never embraced by Congress, which allows interlocutory appeals by leave of the appellate court. 352 U.S. at 263.

20. See Note, *The Writ of Mandamus: A Possible Answer to the Final Judgment Rule*, 50 COLUM. L. REV. 1102 (1950); Comment, *Federal Rule 54(b) and The Final Judgment Rule*, 47 MICH. L. REV. 233 (1948).

decision on the traditional "aid of jurisdiction" requirement, the Court seems to take the approach of considering the necessity for the writ by balancing the general policy of finality against the adequacy or inadequacy of appeal upon final judgment, as applied to the particular facts in the case.[21] This approach escapes the injustice which an inflexible, rigidly applied final judgment rule is bound to work at times. There is a need for some flexibility, so that in exceptional situations review may be had, through the use of the writs, of an otherwise non-appealable order. In addition to using the prerogative writs in aid of their appellate jurisdiction, in the so-called "hardship" cases the appellate courts should expand the use of their power under the All Writs Act to supplement their appellate power, affording relief from the final judgment rule.

FEDERAL JURISDICTION AND PROCEDURE —VENUE— ACTION AGAINST CORPORATION FOR PATENT INFRINGEMENT

Petitioner, a West Virginia corporation, was sued for patent infringement in the Federal District Court for the Southern District of New York. Although petitioner had an established place of business in that district, the action was dismissed for lack of venue because there was no showing of acts of infringement there.[1] The special venue statute[2] for patent infringements restricts venue to the district "where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business." However, a general venue statute[3] provides that a corporation may be sued "in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes." In reversing, the court of appeals held that the general section's definition of corporate residence must be "read into" the meaning of the word "resides" in the special section, thereby permitting suit wherever petitioner is "doing business".[4] *Held,* reversed. Venue in patent

21. This general view has been advocated by some writers as a possible answer to the hardships of the final judgment rule. See, *e.g.,* 6 MOORE, FEDERAL PRACTICE, ¶ 54.10(6) (Supp. 1956); Crick, *The Final Judgment Rule as a Basis For Appeal,* 41 YALE L.J. 539 (1932); Note, *The Writ of Mandamus: A Possible Answer to the Final Judgment Rule,* 50 COLUM. L. REV. 1102 (1950).

1. Transmirra Products Corp. v. Fourco Glass Co., 133 F. Supp. 531 (S.D.N.Y. 1955).
2. 28 U.S.C. § 1400(b) (1952).
3. 28 U.S.C. § 1391(c) (1952).
4. Transmirra Products Corp. v. Fourco Glass Co., 233 F.2d 885 (2d Cir. 1956).

infringement actions is controlled exclusively by the special section enacted for this type of litigation. *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222 (1957).

The exclusiveness of the special venue provision for patent infringements under the 1911 Judicial Code[5] was firmly established in *Stonite Products Co. v. Melvin Lloyd Co.*[6] However, the question was re-opened by certain changes and additions in the 1948 code revision,[7] creating considerable conflict over venue of corporate defendants in patent infringement suits. The broad, new definition of corporate residence set out in title 28, section 1391(c) of the United States Code,[8] coupled with the word substitutions in the special venue provision, section 1400(b),[9] has precipitated a semantical battle over whether these respective venue provisions are "complementary"[10] or "mutually exclusive".[11] Generally, courts which have held section 1400(b) solely controlling in patent infringement suits have felt that the reviser's notes following this section show an absence of congressional intent to change the law existing prior to the code revision;[12] that the second alternative in section 1400(b),[13] when applied to corporations, is emasculated by an insertion therein of the

5. 36 STAT. 1100 (1911).
6. 315 U.S. 561 (1942).
7. 62 STAT. 869 (1948).
8. Section 1391(c) is the first legislative enactment defining the term "residence" as applied to corporations.
9. The reviser's notes following § 1400 state: "Words in subsection (b) 'where the defendant resides' were substituted for 'of which the defendant is an inhabitant.' . . . Words 'inhabitant' and 'resident,' as respects venue, are synonymous. (See reviser's note under section 1391 of this title.)" H.R. REP. No. 308, 80th Cong., 1st Sess. A130-31 (1947); 28 U.S.C. at p. 4197 (1952).
10. The "complementary" theory insists that the definition of a corporation's residence in § 1391(c) be "read into" § 1400(b), in keeping with the clear meaning which the words of the respective sections convey. See Note, 21 GEO. WASH. L. REV. 610, 618-21 (1953).
11. Basis for the "mutually exclusive" theory lies in the legislative history of venue in patent infringement cases. From the abuses and injustices engendered by the early general venue statutes, the Act of 1897, 29 STAT. 695, and the Judicial Code of 1911, 36 STAT. 1100, both sought to restrict venue in patent infringement suits by providing special and separate sections to control this area of litigation. See Note, *supra* note 10, at 612-15.
12. See note 9 *supra*. In drafting the revision of title 28 it was decided that intended changes or modifications of prior law would be clearly explained in the reviser's notes appurtenant to each code section. H.R. REP. No. 308, 80th Cong., 1st Sess. 7, A1 (1947). The Chief Reviser of title 28, W.W. Barron, reported: "[N]o changes of law or policy will be presumed from changes of language in revision *unless an intent to make such changes is clearly expressed.* Mere changes of phraseology indicate no intent to work a change of meaning but merely an effort to state in clear and simpler terms *the original meaning of the statute revised.*" 8 F.R.D. 439, 445-46 (1949). (Emphasis added.) It should be noted that the use of the word "inhabitant" in the 1911 code avoided the present problem, since "inhabitant," as regards a corporation, was held to refer to the state of incorporation. Neirbo Co. v. Bethlehem Corp., 308 U.S. 165 (1939); Bulldog Elec. Products Co. v. Cole Elec. Products Co., 134 F.2d 545 (2d Cir. 1943); Weller v. Penn. R.R., 113 Fed. 502 (C.C.D. Colo. 1902).
13. See note 2 *supra*, and text pertinent thereto.

definition of corporate residence set out in section 1391(c);[14] and that, in any event, where statutes contain both a general and a special provision, the latter being within the scope of the former, terms of the special provision prevail over those of the general provision.[15] But courts which have held section 1391(c) applicable to, and therefore complementary to, section 1400(b) have forcefully expressed to the contrary that the pertinent statutory text, which is clear and unambiguous, necessitates no reference to legislative history through the reviser's notes,[16] which are at best unclear as to the relation between sections 1391(c) and 1400(b).[17] Furthermore, these courts feel that implicit in an extention of the "mutually exclusive" theory is the anomalous effect of rendering section 1391(c) inapplicable to all other special sections having residence as a basis for venue;[18] and, finally, that a broadening of venue in patent infringement suits to any district wherein the corporate defendant "is doing business" is consistent with Congress' express desire to facilitate procedural fairness in suits against corporations, commensurate with the increased diversity of corporate activity.[19] The result of these opposing arguments

14. "And if a corporation can be sued where it 'is doing business,' what possible purpose can be served by the second venue alternative, 'where the defendant has committed acts of infringement and has a regular and established place of business'? . . . Such an anomalous theory, if embraced, would make a dead letter out of the second alternative in the patent venue section." C-O-Two Fire Equipment Co. v. Barnes, 194 F.2d 410, 413 (7th Cir. 1952). *But see* Note, *Venue in Patent Infringement Suits in the Federal Courts*, 47 NW. U. L. REV. 699, 703 (1952), wherein it is suggested: "In answer to this argument, it may be pointed out that 1400(b) applies to both corporate and individual infringers, and that the second clause of 1400(b) is not rendered superfluous when applied to individuals, rather than corporations."

15. See MacEvoy Co. v. United States, 322 U.S. 102, 107 (1944); D. Ginsberg & Sons, Inc. v. Popkin, 285 U.S. 204, 208 (1932). Consequently, a special patent venue section will control over a general corporation venue section. See 1 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE 135 (1950). To conclude otherwise would negative the privilege of limited venue which was conferred upon defendants in patent cases by the predecessor to § 1400(b). C-O-Two Fire Equipment Co. v. Barnes, *supra* note 14.

16. See *Ex parte* Collett, 337 U.S. 55 (1949); Gemsco, Inc. v. Walling, 324 U.S. 244 (1945). *But see* C-O-Two Fire Equipment Co. v. Barnes, 194 F.2d 410, 414-15 (7th Cir. 1952), wherein the court concluded that the *Collett* case was not applicable since the provisions involved there were not inconsistent, and therefore effect could be given to both provisions.

17. See Farr Co. v. Gratiot, 92 F. Supp. 320, 322 (S.D. Cal. 1950). See also Note, 21 GEO. WASH. L. REV. 610, 621 (1953) where it is suggested: "The reviser's notes, which purport to represent the legislative intent behind Title 28 of the Code, present a weak foundation because the notes are silent as to the relation between Section 1391(c) and Section 1400(b). This manifests a failure to recognize the problem."

18. 28 U.S.C. §§ 1396 (collection of internal revenue taxes), 1397 (interpleader), 1398 (Interstate Commerce Commission's orders), 1400(a) (copyrights), 1402 (certain actions against the United States) are all special venue provisions having residence as a basis for venue. If § 1391(c) is not to be used to define § 1400(b), then it would not be used to define "resides" in the above provisions, and would be virtually meaningless. See Farr Co. v. Gratiot, *supra* note 17, at 322 (dictum); Note, 47 NW. U.L. REV. 699, 703 (1952).

19. Transmirra Products Corp. v. Fourco Glass Co., 233 F.2d 885, 886 (2d

is a virtual even split in court decisions on this issue.[20] Indeed, the perplexities of the problem were pointed up in 1952 by the Supreme Court's four-to-four split in *Cardox v. C-O-Two Fire Equipment Co.*,[21] leaving the question unresolved.

Thus, the importance of the instant case cannot be overstated; for the first time since the 1948 code revision, the Supreme Court has rendered a binding decision on this troublesome question of statutory interpretation.[22] It is interesting to note that in doing so, the court has rejected an appeal from the preponderance of text writers for a contrary decision.[23] These writers would have had the court give effect to the "practical" approach of extending venue of the corporate defendant commensurate with the growing complexity of corporate operations. Instead, the effect of the decision at hand is to rectify a case of awkward legislation[24] by giving great weight to the reviser's notes,[25] and concluding therefrom that the legislature intended no change in the special venue provision for patent infringement. Therefore, the ruling in the *Stonite* case remains in force under the 1948 code revision, and the general expansion of venue in federal courts is denied in the particular area of suits for infringement of patents by corporations.

While the benefits to the district courts of a firm ruling are obvious, certain questions remain unanswered. If section 1391(c) is not to be used to define "resides" in section 1400(b), will it likewise be inapplicable to the other special venue provisions?[26] If so, what then is

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Cir. 1956); 1 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE 153-54 (1950).

20. "Six district courts and one circuit court of appeals have held that the definition of corporate residence for venue purposes set out in Section 1391(c) is not applicable to actions involving patent infringement, whereas four district courts and one circuit court of appeals have held to the contrary." Note, 21 GEO. WASH. L. REV. 610, 611 & nn. 3, 4, 5, 6 (1953). Since 1952, one circuit court has rendered a decision holding § 1400(b) solely controlling. Ruth v. Eagle-Picher Co., 225 F.2d 572 (10th Cir. 1955). One circuit has rendered a contrary decision. Guiberson Corp. v. Garrett Oil Tools, Inc., 205 F.2d 660 (5th Cir. 1953).

21. 344 U.S. 861 (1952).

22. The *C-O-Two* case was affirmed by an equally divided court, no opinion accompanying the order. *Ibid.*

23. Professor Moore, a member of the revision staff, has stated with reference to the relation of § 1391(c) to § 1400(b): "While this definition is found in the general venue section it is believed that it is a definition of general applicability to determine corporate residency in § 1400(b)." 3 MOORE, FEDERAL PRACTICE 2139, 2140 (2d ed. 1948). See MOORE, COMMENTARY ON THE U.S. JUDICIAL CODE 185 (1949): "[T]he general provisions of § 1391(c) dealing with the residence of . . . corporate defendant[s] . . . will have a qualifying effect when such parties are defendants to a patent infringement action." See also Notes, 56 COLUM. L. REV. 394, 415 (1956), 21 GEO. WASH. L. REV. 610, 621-22 (1953), 47 NW. U. L. REV. 699, 704-05 (1952).

24. See 21 U.S.L. WEEK 3115 (1952), where Justice Frankfurter said with reference to the code of 1948, while hearing argument on the *C-O-Two* case: "It is about as sloppy a piece of codification as any instance I know of."

25. See notes 9, 12 *supra*.

26. See note 18 *supra*.

its purpose? Such a result would be difficult to reconcile with decisions which have held section 1391(c) applicable to the special venue provisions of the Jones Act[27] and the Clayton Act.[28] It can be argued that the same "legislative intent," so crucial in reaching the decision in the instant case, may well be thwarted by applying this holding to cases involving corporate defendants under other special venue sections.[29]

HABEAS CORPUS—JURISDICTION OF CRIMINAL COURT—COLLATERAL ATTACK LIMITED TO DEFECTS ON FACE OF RECORD

Tennessee law gives juvenile courts exclusive jurisdiction of persons under eighteen years of age charged with crimes other than murder and rape.[1] Petitioner was seventeen when convicted and sentenced in criminal court on pleas of guilty to charges of kidnaping, armed robbery and grand larceny. Thereafter he brought habeas corpus proceedings, contending that the convictions were void for lack of jurisdiction. At the hearing petitioner proved conclusively that he was seventeen at the time of his conviction and denied state evidence that he had given his age as eighteen at the time of trial. The record of the former proceeding was silent on the point. The habeas corpus petition was sustained. On certiorari by the Tennessee Supreme Court, *held,* reversed. The criminal court is a court of general jurisdiction and therefore its judgments may not be questioned in habeas corpus proceedings for jurisdictional defects not appearing on the face of the record. *Bomar v. State ex rel. Stewart,* 300 S.W.2d 885 (Tenn. 1957).

At common law a judgment rendered by a court of general criminal jurisdiction was conclusive proof in a habeas corpus proceeding that confinement was legal.[2] The same principle applied in collateral attacks on civil judgments.[3] Later, American courts began looking

27. 41 STAT. 1007 (1920), 46 U.S.C. § 688 (1952). See Phillips v. Pope & Talbot, Inc., 102 F. Supp. 51 (S.D.N.Y. 1952); Mincy v. Detroit & Cleveland Nav. Co., 94 F. Supp. 456 (S.D.N.Y. 1950); Bagner v. Blidberg Rothchild Co., 84 F. Supp. 973 (E.D. Pa. 1949).

28. 38 STAT. 736 (1914), 15 U.S.C. § 22 (1952). See Bertha Bldg. Corp. v. National Theaters Corp., 103 F. Supp. 712 (E.D.N.Y. 1952); Lipp v. National Screen Service Corp., 95 F. Supp. 66 (E.D. Pa. 1950).

29. See note 18 *supra.*

1. TENN. CODE ANN. §§ 37-242 to -243, 37-265 (Supp. 1957).

2. United States v. Hayman, 342 U.S. 205, 210-11 (1952); *Ex Parte* Watkins, 28 U.S. (3 Pet.) *193 (1830); Crosby, Lord Mayor, 3 Wils. K.B. 188, 95 Eng. Rep. 1005 (1771). See Habeas Corpus Statute, 1679, 31 CAR. 2, c. 2.

3. Kilcrease's Heirs v. Blythe, 25 Tenn. 378 (1845); Peacock v. Bell, 1 Wms. Saun. 73, 85 Eng. Rep. 84 (K.B. 1668).

behind the judgment to see if the record disclosed facts showing that the sentencing court lacked jurisdiction.[4] Congress has broadened the scope of the writ by statute, particularly in 1867,[5] so that federal courts will accept evidence dehors the record showing violation of federally protected rights.[6] Similar results have been reached under a California statute,[7] and courts in other jurisdictions have used language indicating a broader view not resting on statutes.[8] The general view, however, still appears to be that the judgment of a court of general jurisdiction is immune to collateral attack by habeas corpus proceedings unless the record itself shows that the judgment is void for lack of jurisdiction.[9]

The court in the instant case was first faced with the problem of determining whether the criminal court is a court of general jurisdiction even though a portion of that court's jurisdiction had been carved away by the statutes creating the juvenile court. Although this is a problem in definition which has not lent itself to easy reduction to an all-purpose rule,[10] the view adopted by this court—that a court which proceeds "according to the course of the common law"[11] is a court of general jurisdiction—does not appear to be out of harmony with results reached elsewhere.[12] The Tennessee court, rounding out a consistent rule to limit collateral attacks on judgments, whether civil or criminal, then held that the jurisdiction of the criminal court may not be attacked by habeas corpus for defects not appearing on the face of the record. Although its decision rests on precedents concerning civil judgments,[13] the result is in harmony with the historic

4. See People *ex rel.* Tweed v. Liscomb, 60 N.Y. 559 (1875).

5. 14 STAT. 385, c. 28 (1867). The essential wording as retained today extends the writ to a prisoner who "is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c) (3) (1952).

6. United States v. Hayman, 342 U.S. 205 (1952); Johnson v. Zerbst, 304 U.S. 458 (1938); Moore v. Dempsey, 261 U.S. 86 (1923); Frank v. Mangum, 237 U.S. 309 (1915). For a discussion of the development of the federal writ, see Peters, *Collateral Attack by Habeas Corpus upon Federal Judgments in Criminal Cases*, 23 WASH. L. REV. 87 (1948).

7. CAL. PEN. CODE § 1484 (Deering 1949). See *Ex Parte* Seeley, 29 Cal. 2d 294, 176 P.2d 24 (1946).

8. See *e.g.*, State *ex rel.* Clayton v. Jones, 192 La. 671, 188 So. 737 (1939); Wade v. Warden of State Prison, 145 Me. 120, 73 A.2d 128 (1950); Petition of O'Leary, 325 Mass. 179, 89 N.E.2d 769 (1950).

9. Reynolds v. McFadyen, 259 Ala. 235, 66 So. 2d 89 (1953); Schultz v. Lainson, 234 Iowa 606, 13 N.W.2d 326 (1944); Superintendent of Maryland State Reformatory v. Calman, 203 Md. 414, 101 A.2d 207 (1953); State *ex rel.* Pinkerman v. Utecht, 231 Minn. 331, 43 N.W.2d 97 (1950); 39 C.J.S., *Habeas Corpus* § 16 (1944).

10. See 15 C.J., *Courts* § 2 n.49 (1918).

11. 300 S.W.2d at 887, citing Pope v. Harrison, 84 Tenn. 82 (1885).

12. See 21 C.J.S., *Courts* §§ 3, 7 (1940).

13. Puckett v. Wynns, 132 Tenn. 513, 178 S.W. 1184 (1915); Wilkins v. McCorkle, 112 Tenn. 688, 80 S.W. 834 (1904). The rationale of the rule was first expressed by a Tennessee court in Miller's Lessee v. Holt, 1 Tenn. 49, 53-54 (1804): "In cases where the court proceeds according to the course of the common law, and not in a summary way, all preliminary steps in a cause might be presumed. But where an authority is given by statute to be executed in

rule on habeas corpus. The court indicated, however, that this rule may not be ironclad and left the door open for future exceptions in cases in which it should appear necessary to carry out the policy of the juvenile court statutes, which the court says is to keep persons less than eighteen years of age away from adult convicts.[14] In the case at bar the court felt that this purpose was not controlling because petitioner had passed the age of eighteen and had already spent a year and a half in the penitentiary with adult criminals.[15]

Those used to thinking of the scope of habeas corpus in relation to liberal federal court rules may be shocked that the writ cannot be used in a state court to free a prisoner from a sentence of a court which should not have tried him in the first place. It should be remembered that petitioner had the right to have the sentence reviewed on appeal and still has the right to seek executive clemency. If these remedies are deemed inadequate to provide for all situations, it does not necessarily follow that expansion of the extraordinary remedy of habeas corpus is the proper way of meeting the need. Such expansion multiplies administrative problems, as the federal courts have learned, especially those which have been harried by "prison lawyers."[16] This, in turn, may create pressure to develop devices for curbing abuse,[17] and curbing abuse without curbing proper use is a delicate and difficult matter. The glory of the writ is that it gives the prisoner the power to force his jailer to account immediately to a responsible judge for his detention, and to do so as often as apparent flaws in the jailer's authority may be discovered. The jailer is the defendant; and unless he is to become a mere formal party like the lessee in the old action of ejectment, it is hard to see why he should be asked to defend himself for accepting at face value the judgment of a court of such stature that it could pronounce a death sentence.

INCOME TAXATION—DEDUCTIONS—PREPAID INSURANCE PREMIUMS

Petitioner, a cash basis taxpayer, is a Missouri corporation engaged in the business of ownership and management of real estate. Taxpayer protected its property with insurance coverage and in computing

a summary manner, the record of such proceeding ought to show that the material parts of such authority were pursued; otherwise, they cannot be intended."

14. 300 S.W.2d at 888.

15. *Ibid. But cf.* Sams v. State, 133 Tenn. 188, 196, 180 S.W. 173, 175 (1915); State *ex rel.* v. Griffin, 7 Tenn. Civ. App. 230 (1918).

16. For a discussion of these problems, see United States v. Hayman, 342 U.S. 205, 212 (1952).

17. *Id.* at 214.

its income for 1950, 1951 and 1952 deducted, as a business expense, insurance premiums paid during such years even though the insurance coverage so purchased extended to years subsequent to 1952. The Tax Court, agreeing with the Commissioner, determined that prepaid insurance deductions must be prorated over the life of the policies.[1] On petition for review to the court of appeals, *held,* reversed. Where no substantial distortion of income results, a cash basis taxpayer may deduct prepaid insurance premiums in the year in which the premiums are actually paid. *Waldheim Realty and Inv. Co. v. Commissioner,* 245 F.2d 823 (8th Cir. 1957).

Business expenses are deductible if they are ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business.[2] No deduction is allowed for capital expenditures, or amounts paid out for new buildings or permanent improvements.[3] However, certain expenditures made by a business are classified as amortizable capital expenditures, which may be deducted; but the total amount of the expenditure deduction must be prorated over the life of the item in question.[4] Examples of amortizable capital expenditures include prepayment of rentals,[5] bonuses for the acquisition of leases,[6] bonuses for the cancellation of leases[7] and commissions for negotiating leases.[8] In all of the above situations the items for which money was paid are treated as exhaustable assets. Deductions are allowed but proration is required primarily because the life of the asset extends beyond the taxable year.

The question of when prepaid insurance premiums may be deducted depends upon whether the prepaid insurance is considered an ordinary and necessary business expense or an amortizable capital expenditure. This question has caused the Commissioner, the taxpayer and the courts no little difficulty. In 1934 the Commissioner determined that business expense deductions of prepaid insurance should be prorated over the life of the policies.[9] However, the First Circuit, in *Welch v. DeBlois*[10] held that a cash basis taxpayer could deduct in-

1. Waldheim Realty and Inv. Co., 25 T.C. 1216 (1956).
2. INT. REV. CODE OF 1939, § 23(a)(1)(A), 53 STAT. 12 (now INT. REV. CODE OF 1954, § 162(a)).
3. INT. REV. CODE OF 1939, § 24(a)(2)-(3), 53 STAT. 16 (now INT. REV. CODE OF 1954, § 263(a)).
4. INT. REV. CODE OF 1939, §§ 23 (*l*), (n), 113 (a), (b), 114, 53 STAT. 14, 40, 44-45 (now INT. REV. CODE OF 1954, §§ 167, 1011-12). See also INT. REV. CODE OF 1954, § 461.
5. Baton Coal Co. v. Commissioner, 51 F.2d 469 (3d Cir.), *cert. denied,* 284 U.S. 674 (1931).
6. Home Trust Co. v. Commissioner, 65 F.2d 532 (8th Cir. 1933).
7. Steele-Wedeles Co., 30 B.T.A. 841 (1934).
8. Bonwit Teller & Co. v. Commissioner, 53 F.2d 381 (2d Cir. 1931).
9. G.C.M. 13148, XIII-I CUM. BULL. 67 (1934).
10. 94 F.2d 842 (1st Cir. 1938). The court said the practice of buying insurance for a term of years was a well-recognized business custom and expense, and such an expenditure could not be considered as a capital expenditure.

surance premiums in the year in which they were paid. As a result of this decision the Commissioner reversed his official position in 1938.[11] The Tax Court, however refused to follow the *Welch* decision in a few instances.[12] *Welch v. DeBlois* was soon expressly overruled by *Commissioner v. Boylston Market Ass'n*,[13] which held that the deduction must be prorated over the life of the policy. As a result, in 1943 the Commissioner again reversed himself and reverted to his original 1934 position.[14]

Since 1943, and until the instant case was decided, the First Circuit and the Tax Court[15] have required proration of prepaid insurance premiums even though the taxpayer was utilizing the cash basis accounting system. The instant case refused to follow the First Circuit and elected to follow the overruled *Welch* decision.[16] As a result, in the Eighth Circuit at least, prepaid insurance premiums are deductible in the year paid. In justification of its decision that prepaid insurance is an ordinary and necessary business expense and not an amortizable capital expenditure, the court points out that (1) since 1905, this cash basis taxpayer has always deducted prepaid insurance in the year premiums were paid and (2) no substantial distortion of income resulted from such treatment of insurance deductions.

The decision creates some confusion in the uniform administration of the income tax law. Now, in the First Circuit deductions for prepaid insurance must be prorated over the life of the policies, while in the Eighth Circuit the same deduction may be taken in the year premiums are paid.[17] As a result at the present time the administration of certain tax laws is geographical. While the Supreme Court frequently grants certiorari in cases of conflict between the circuits, it will not be surprising if the court refuses to do so here. Technical accounting rules for tax administration are better formulated by the Congress. Although the instant case creates an obvious conflict and an administrative problem for the Commissioner, it seems that the case is rightly decided. The problem is one of timing deductions, and the holding of the instant case is consistent with the theory of cash basis tax accounting—deductions should be taken in the year paid. At least this case brings into focus the inconsistent treatment of prepaid income and

11. G.C.M. 20307, 1938-1 CUM. BULL. 157.
12. Frank Real Estate & Inv. Co., P-H 1939 T.C. Mem. Dec. ¶ 39, 499; George S. Jephson, 37 B.T.A. 1117 (1938).
13. 131 F.2d 966 (1st Cir. 1942). See Note, 56 HARV. L. REV. 818 (1943). The court was concerned to some extent with the possibility of distortion of income if a full deduction was allowed in any one year.
14. G.C.M. 23587, 1943-1 CUM. BULL. 213.
15. Bessie Cohen, P-H 1951 T.C. Mem. Dec. ¶ 51,009 Martha R. Peters, 4 T.C. 1236 (1945).
16. "We believe that the opinion in the DeBlois case is more persuasive than the Boylston Market opinion." 245 F.2d at 828.
17. See generally, 2 MERTENS, FEDERAL INCOME TAXATION § 12.26 (Supp. July 1957).

prepaid expenses. The Commissioner requires prepaid income to be reported and taxed in the year received[18] while it has been thought that prepaid expenses must be prorated over the life of the amortizable asset. This inconsistent treatment does not seem fair to the taxpayer. It is hoped that the Congress will correct this situation by providing for uniform and consistent treatment of both prepaid income and prepaid expenses. This treatment can now be accomplished with little difficulty for those cases in which it can be shown to the court that no *substantial* distortion of income results when a cash basis taxpayer takes deductions for prepaid expenses in the year in which the expenses are incurred.

INCOME TAXATION—DISTRIBUTION OF CORPORATE EARNINGS—PREMIUMS ON LIFE INSURANCE POLICY TO FUND PENSION CONTRACT WITH SHAREHOLDER-OFFICER

A close corporation purchased an insurance policy on the life of its president and majority stockholder, who owned 98% of the stock in the corporation, in order to fund a pension contract with him.[1] The corporation was the beneficiary, possessed all the incidents of ownership and paid the premiums out of surplus, not claiming a deduction therefor. The policy was treated as an asset on the books of the corporation constituting a fund from which the corporation was not bound,[2] but could, if it so chose, satisfy its oligations under the pension contract. The Tax Court held[3] that the payment of these premiums by the corporation was, in effect, a distribution of earnings to a shareholder[4] and, therefore, taxable to the stockholder as income.[5] On appeal, *held,* reversed. Premiums paid by a close corporation for an insurance policy on the life of taxpayer designed to fund a pension contract with him are not taxable to him as a distribution of income, even where he is the holder of substantially all the corporate shares,[6]

18. North American Oil Consoldiated v. Burnet, 286 U.S. 417 (1932).

1. The corporation obligated itself to pay the president, Oreste Casale, $500 per month upon his reaching age sixty-five or, in the event he should die prior to this time, then $50,000 to his estate or whomever he should name.

2. The corporation could make pension payments out of surplus or current profits if they were available. The insurance policy and its proceeds did not constitute a special fund from which the pension obligations were to be satisfied, safe from claims of other creditors of the corporation.

3. Oreste Casale, 26 T.C. 1020 (1956).

4. Pursuant to INT. REV. CODE OF 1939, § 115(a), 53 STAT. 46 (now embodied in INT. REV. CODE OF 1954, §§ 301, 316(a)).

5. *Ibid.*

6. The Tax Court had held that the corporation was merely a conduit through which Casale accomplished his desired objectives.

as long as such payment is a corporate investment[7] for the direct and immediate benefit of the corporation and results in no direct economic benefit to the taxpayer. *Casale v. Commissioner,* 247 F.2d 440 (2d Cir. 1957).

When a corporation pays insurance premiums on the life of an officer or employee and the estate or family of the insured is the beneficiary, the premiums are taxable to the insured as additional compensation.[8] If the insured is also a stockholder, this payment may be taxable as a constructive dividend.[9] However, when the corporation is the direct beneficiary and the insured shareholder has no nonforfeitable rights in the policy, then the payment of premiums is an investment of corporate capital,[10] and there has been no taxable distribution to the insured shareholder. The 1944 case of *Lewis v. O'Malley*[11] demonstrates that even though the insured benefits to some extent under the policy, it is possible that the premiuun payments will not be considered taxable income to him, as long as the corporation is the primary and immediate beneficiary.

Recent decisions of the Tax Court have been less favorable to the taxpayer. In *Henry E. Prunier*[12] it was held that reservation of the right to change beneficiaries was a sufficient benefit to the insured to constitute the premium payments a direct economic advantage to him and, therefore, taxable income. In another recent case, *Sanders v. Fox,*[13] the court was willing to look behind the corporate entity in separating and weighing the benefits to the corporation and those to the insured. Reservation of the power to designate the beneficiary plus the fact that the insurance proceeds were restricted to a special fund for the purpose of carrying out a buy-sell stock agreement were considered to be a sufficient benefit to the insured stockholder to make these premium payments corporate distributions and, therefore, taxable as dividends. In the instant case, the absence of any of the incidents of ownership in the insured stockholder, the immediate availability of the policy as security for loans, availability of the policy and its proceeds to creditors of the corporation[14] and the probability that

7. If Casale had died between the ninth and thirteenth years of the policy, (he would reach age sixty-five during the thirteenth year) the corporation would have received an amount substantially in excess of its obligation under the contract.

8. Commissioner v. Bonwit, 87 F.2d 764 (2d Cir.), *cert. denied,* 302 U.S. 694 (1937); Frank D. Yuengling, 27 B.T.A. 782 (1933), *aff'd,* 69 F.2d 971 (3d Cir. 1934); N. Loring Danforth, 18 B.T.A. 1221 (1930); George Matthew Adams, 18 B.T.A. 381 (1929).

9. Paramount-Richards Theatres v. Commissioner, 153 F.2d 602 (5th Cir. 1946); Casper Ranger Constr. Co., 1 B.T.A. 942 (1925).

10. Merrimac Hat Corp., 29 B.T.A. 690 (1934).

11. Lewis v. O'Malley, 140 F.2d 735 (8th Cir. 1944).

12. 28 T.C. No. 4 (April 12, 1957).

13. 149 F. Supp. 942 (D. Utah 1957).

14. See, *e.g.,* Lincoln Nat'l Life Ins. Co. v. Scales, 62 F.2d 582 (5th Cir. 1933).

the policy would be worth substantially more to the corporation than its obligation to the insured[15] combined to convince the court that it was unnecessary to look behind the corporate entity. The court concluded that this insurance policy was indeed an investment medium of the corporation fulfilling a valid corporate purpose, and not a corporate distribution resulting in taxable income to the insured stockholder.

The holding of the instant case is in conformance with past decisions concerning the corporate payment of insurance premiums on the lives of officers, employees and stockholders. The importance of this case lies not only in the fact that it furnishes an example of the method to be followed in establishing and administering key-man and buy-sell stock agreements funded by the corporate purchase of life insurance policies, but also because it contains a caveat that there must be no direct benefit to the insured or the premium payments will be declared a corporate distribution and taxable as income. This case should have no effect on the holding of the *Prunier* case, as the two cases are distinguishable.[16] Whether the restriction of the insurance policies and their proceeds to a special fund not available to creditors of the corporation to fund a buy-sell stock agreement is alone a sufficient interest in the policy to make premium payments taxable as a corporate distribution is a question not answered by this case. This holding is more favorable to the taxpayer than that of the *Sanders* case because this court declined to look behind the corporate entity in identifying the benefits to the insured. The lesson to be learned is that the insured person should receive no nonforfeitable rights or direct benefits under the policy, and that the corporation should not only be the direct beneficiary, but should also derive immediate economic benefit from the payment of the premiums under the policy.[17]

15. See note 7 *supra.*

16. Since the writing of this note, the *Prunier* case has been reversed by the First Circuit, on the ground that under Massachusetts law the corporation was the true beneficial owner of the insurance policies in question. (RECENT CASES) CCH 1957 STAND. FED. TAX REP. ¶ 10,015. The Tax Court decisions in *Prunier* and *Casale* serve as danger signals warning against carelessness in insurance planning.

17. See Miller, *Insurance, Annuities, and Other Employee Benefits from the Executive's Point of View,* 33 TAXES 964 (1955).

JUDGMENTS—RES JUDICATA—EFFECT OF STATE COURT DETERMINATION OF PATENT INFRINGEMENT AS COLLATERAL ESTOPPEL

In a patent infringement action for damages in a federal district court defendant moved for summary judgment on the ground of collateral estoppel, asserting that in a previous state court action brought by plaintiff for accounting under a royalty contract the same issue of patent coverage had been decided adversely to the plaintiff.[1] Plaintiff contended that the state court decision was not binding in this action because the two causes of action were different and because the state court would not have had jurisdiction to decide the issue of patent infringement, had it been brought directly before it for determination.[2] On appeal from a summary judgment for defendant, *held*, affirmed. A state court decision in a royalty contract suit determining that licensee's device was not within the scope of a patent bars litigation of the same issue in a subsequent infringement suit between the same parties in federal court. *Vanderveer v. Erie Malleable Iron Co.*, 238 F.2d 510 (3d Cir. 1956).

The doctrine of res judicata is based on a policy requirement that a controversy, once litigated, should forever be set at rest.[3] The term is commonly applied to the situation in which a judgment is held to bar retrial of the same cause of action in a subsequent suit between the same parties.[4] Collateral estoppel is the subsidiary doctrine that when a fact essential to a judgment is litigated and determined by a valid and final judgment, the determination is conclusive between the parties in a subsequent suit on a different cause of action.[5] An

1. Vanderveer v. Erie Malleable Iron Co., 384 Pa. 12, 119 A.2d 205 (1956). Plaintiff sought accounting in equity by defendant company for royalties allegedly due under patent licensing agreement. In its answer defendant averred, among other defenses, that the device produced by it did not infringe plaintiff's patent. The issue of infringement was therefore an "ultimate fact" within the meaning of Judge Learned Hand's definition in The Evergreens v. Nunan, 141 F.2d 927 (2d Cir. 1944), and subject to collateral estoppel.

2. Plaintiff's two other contentions were dismissed summarily by the court: (a) The argument that the former judgment should not apply because this suit charged infringement over a different period of time was held to be without merit. Since the plaintiff conceded that the same patent and device were at issue, the court held that collateral estoppel still applied, on authority of Tait v. Western Maryland Ry., 289 U.S. 620 (1933). (b) Plaintiff's argument that the construction of patents is a matter of law to which a state judgment is not collateral estoppel in the federal courts was held not acceptable. The court said the question of infringement is a finding of ultimate fact, to which the doctrine of collateral estoppel is applicable, The Evergreens v. Nunan, 141 F.2d 927 (2d Cir. 1944); RESTATEMENT, JUDGMENTS § 68 (1942); and that even the determination of a pure question of law is collateral estoppel in such cases if no unjust result would follow. Commissioner v. Sunnen, 333 U.S. 591 (1948).

3. 2 BLACK, JUDGMENTS §§ 504, 506 (1891).

4. RESTATEMENT, JUDGMENTS §§ 47, 48 (1942).

5. *Id.* § 68.

exception to this doctrine has been recognized when the court which incidentally determined the matter would have had no jurisdiction to entertain the controversy directly.[6] Early precedents were set by applying the exception to courts of limited jurisdiction as to subject matter,[7] or to cases in which a state court necessarily determined ownership of land in another state.[8] When state and federal courts have concurrent jurisdiction over the matter at issue, it is uniformly held that collateral estoppel applies.[9] However, since original jurisdiction over cases concerning patent controversies is restricted to federal courts,[10] the drafters of the *Restatement of Judgments*[11] assumed that, when decisions in state court cases required determination of patent infringements, such findings would not be binding in a subsequent infringement suit between the same litigants before a federal court.[12]

The principal case establishes the rule that, after a state court has determined in a contract suit that defendant's device is not within plaintiff's patent, the fact of noninfringement is conclusively established for purposes of a subsequent federal infringement suit.[13] The court's reasoning proceeds from the settled doctrine that state courts have authority to determine questions—as distinguished from cases—under the patent laws.[14] Prior to this decision such questions decided by state courts were issues of title to patents,[15] contracts covering patents,[16] and the validity of patents;[17] but the Supreme Court had not ruled on the conclusive effect of these determinations in federal court

6. 30 AM. JUR., *Judgments* §§ 182, 183 (1940); 50 C.J.S., *Judgments* § 731 (1947).

7. Baker v. Hart, 3 Atk. 542, 26 Eng. Rep. 1113 (Ch. 1747); Loomis v. Loomis, 288 N.Y. 222, 42 N.E.2d 495 (1942), *reversing*, 262 App. Div. 906, 28 N.Y.S.2d 809 (2d Dep't 1941).

8. Norris v. Loyd, 183 Iowa 1056, 168 N.W. 557 (1918); Greer v. Greer, 189 S.W.2d 104 (Tex. Civ. App. 1945), *reversed on other grounds*, 144 Tex. 528, 191 S.W.2d 848 (1946). *But see* Bailey v. Tully, 242 Wis. 226, 7 N.W.2d 837, 145 A.L.R. 578 (1943).

9. 2 BLACK, JUDGMENTS § 520 (1891).

10. 28 U.S.C. 1338 (1952).

11. RESTATEMENT, JUDGMENTS § 71, comment c (1942).

12. Professor Austin Wakeman Scott of Harvard, who acted with Professor Warren A. Seavey as joint reporter in preparing the *Restatement of Judgments* for the American Law Institute, has written concerning this point that "[a]though the authorities are somewhat meager, it seems clear that the judgment should not preclude the parties as to the matter in a subsequent action between them brought expressly to determine the matter in a court which has jurisdiction to determine it." Scott, *Collateral Estoppel by Judgment*, 56 HARV. L. REV. 1, 18-19 (1942).

13. 238 F.2d at 514.

14. Pratt v. Paris Light & Coke Co., 168 U.S. 255 (1897).

15. Consolidated Fruit Jar Co. v. Whitney, 6 Fed. Cas. 349, No. 3,134 (C.C.D.N.J. 1876); Consolidated Fruit Jar Co. v. Whitney, 6 Fed. Cas. 345, No. 3,133 (C.C.D.N.J. 1875).

16. New Marshall Engine Co. v. Marshall Engine Co., 223 U.S. 473 (1912); Cavicchi v. Mohawk Mfg. Co., 34 F. Supp. 852 (S.D.N.Y. 1940).

17. Pratt v. Paris Light & Coal Co., 168 U.S. 255 (1897).

suits.[18] However, Justice Holmes said in *Becher v. Contoure Laboratories, Inc.*[19] that a state court's determination of the fact of ownership of an invention could serve to estop relitigation of the same fact in a subsequent patent infringement suit in a federal court,[20] and this precedent had been applied in lower court cases.[21] The instant case extends these limits of state determination to include the fact of infringement. In effect, this decision lifts patent fact controversies from the exception outlined in section 71 of the *Restatement of Judgments*,[22] while directly discrediting comment c through the dicta of Judge Maris.[23]

In an era when court dockets are bulging with pending cases it is understandable that the public policy consideration of avoiding relitigation of issues should prevail over the more academic desire to preserve the symmetry of the law.[24] It is probable that Congress was motivated primarily by a desire to obtain consistency in patent jurisprudence rather than a distaste for state adjudication when it vested exclusive jurisdiction over patent matters in federal courts. Therefore, as long as incidental state court rulings on patent matters are confined to fact issues which do not encroach on the federal courts' mandate to construe the patent laws, such rulings should continue to be collateral estoppel in federal courts.

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18. Instant Case, 238 F.2d at 513.

19. 279 U.S. 388 (1929).

20. "That decrees validating or invalidating patents belong to the Courts of the United States does not give sacrosanctity to facts that may be conclusive upon the question in issue. A fact is not prevented from being proved in any case in which it is material, by the suggestion that if it is true an important patent is void—and, although there is language here and there that seems to suggest it, we can see no ground for giving less effect to proof of such a fact than any other. A party may go into a suit estopped as to a vital fact by a covenant. We see no sufficient reason for denying that he may be equally estopped by a judgment." *Id.* at 393.

21. Cavicchi v. Mohawk Mfg. Co., 34 F. Supp. 852 (S.D.N.Y. 1940); Zachs v. Aronson, 49 F. Supp. 696 (D. Conn. 1943).

22. "If an action is brought in a State court on a promissory note, and the defendant in his answer alleges that the note was given for a void patent, the decision of the court that the patent was or was not void is not binding on a subsequent action brought in a federal court to have the patent declared void, or to enjoin an infringement of the patent . . ."

23. It is interesting that Judge Maris served on the American Law Institute's Committee on Judgments which drafted the *Restatement*.

24. "The question in all these cases is one of public policy. Should a court which has not been entrusted with jurisdiction to determine a matter be permitted to determine it incidentally, not merely for the purposes of deciding the controversy which it can properly decide, but also with the effect of precluding the parties from litigating the question in courts which alone are entrusted with jurisdiction to determine it directly." Scott, *Collateral Estoppel by Judgment*, 56 HARV. L. REV. 1, 22 (1942).

LABOR LAW—SECTION 301 OF THE TAFT-HARTLEY ACT—ENFORCEMENT OF CONTRACTS TO ARBITRATE FUTURE DISPUTES

Plaintiff-union and defendant-employer entered into a collective bargaining agreement containing specified grievance procedure, the last step of which was arbitration at the request of either party. A subsequent controversy over work loads and work assignments was processed through the established grievance procedure, but no settlement being reached, the union requested arbitration in accordance with the agreement. The employer refused and the union brought suit in the federal district court, which held that the employer must submit the grievance to arbitration as provided in the agreement. The court of appeals reversed,[1] holding that the district court had jurisdiction to entertain the suit but that in the absence of authority under either state or federal law it could not grant such relief. On certiorari from the United States Supreme Court, *held* (7-1), reversed. Section 301 of the Taft-Hartley Act[2] not only gives federal district courts jurisdiction of controversies involving labor contracts in industries affecting commerce, without regard to diversity of citizenship or amount in controversy, but also authorizes federal courts to fashion a body of federal law for enforcement of those collective bargaining agreements and included within that federal law is specific performance of promises to arbitrate grievances under collective bargaining agreements. *Textile Workers Union, CIO v. Lincoln Mills,* 353 U.S. 448 (1957).

Beginning with dicta in *Vynior's Case,*[3] the common law devised the rule that an agreement to arbitrate future disputes would not be enforced by the courts and was revocable at will by either party. This seemed to be the rule at common law in the majority of American jurisdictions.[4] The courts apparently took the view that presently to enforce an arbitration agreement made in the past would be to relinquish their present jurisdiction over the parties and compel the parties to submit the determination of their presently existing legal relationships to extra-judicial bodies, thereby depriving the courts of their proper function.[5] Although growing out of commercial arbitration, the rule seems to have been applied equally to cases involving

1. Lincoln Mills v. Textile Workers Union, CIO, 230 F.2d 81 (5th Cir. 1956).

2. Labor Management Relations Act of 1947 § 301, 61 STAT. 156, 29 U.S.C. § 185 (1952).

3. 8 Co. Rep. 816, 77 Eng. Rep. 597 (1609). For complete early history see STURGES, COMMERCIAL ARBITRATION AND AWARDS (1930).

4. For a compilation of holdings, see Annot., 135 A.L.R. 79 (1941).

5. Dunton v. Westchester Fire Ins. Co., 104 Me. 372, 71 Atl. 1037 (1908); Rentschler v. Missouri P. Ry., 126 Neb. 493, 253 N.W. 694 (1934).

collective bargaining agreements.[6] Although the common law rule has been changed in some states by statute,[7] a number of jurisdictions have held these statutes to be inapplicable to arbitration clauses in collective bargaining agreements.[8]

At the federal level there seemed to be some doubt whether promises to arbitrate contained in collective bargaining agreements were enforceable. The Federal Arbitration Act, although modifying the general common law rule to the extent that agreements to arbitrate future disputes are now enforceable generally, excepts from its coverage "contracts of employment of . . . workers engaged in foreign or interstate commerce."[9] Although a stay of proceedings order provided for in the arbitration act has been granted in an action for breach of such a contract,[10] most courts refuse so to act on one or more of several grounds, the most important seeming to be that the arbitration act excludes from its operation collective bargaining agreements.[11]

There has been sharp judicial dispute over the applicability of section 301 of the Taft-Hartley Act[12] to arbitration agreements and collec-

6. Goldstein v. International Ladies' Garment Workers' Union, AFL, 328 Pa. 385, 196 Atl. 43 (1938); Utility Workers Union, CIO v. Ohio Power Co., 9 Lab. Arb. 1024 (1947).

7. ARIZ. CODE ANN. § 27-309 (1939); CAL. CODE CIV. PROC. § 1280 (Deering 1953); COLO. REV. STAT. ANN. § 80-5-10 (1953); CONN. GEN. STAT. § 8151 (1949); LA. REV. STAT. § 9:4201 (1950); MASS. ANN. LAWS c. 251, § 14 (1956); MICH. STAT. ANN. § 27.2483 (1943); N.H. REV. STAT. ANN. § 542:1 (1955); N.J. REV. STAT. § 2A:21-1 (1951); N.Y. CIV. PRAC. ACT § 1448-69; OHIO REV. CODE ANN. §§ 12148-1 to -17 (Baldwin 1952); ORE. REV. STAT. § 33.220 (1955); PA. STAT. ANN. tit. 5, § 161 (1930); R.I. GEN. LAWS ANN. § 10-3-2 (1956); WASH. REV. CODE § 7.04.010 (1952); WIS. STAT. § 298.01 (1955).

8. See, for example, Utility Workers Union, CIO v. Ohio Power Co., 77 N.E.2d 629 (Ohio C.P. 1947); Local 1111, United Elec. Workers v. Allen-Bradley Co., 259 Wis. 609, 49 N.W.2d 720 (1951). For a more detailed treatment, see, Gregory and Orlikoff, *The Enforcement of Labor Arbitration Agreements,* 17 U. CHI. L. REV. 233 (1950).

9. 61 STAT. 669 (1947), 9 U.S.C. §§ 1-14 (1952).

10. Lewittes & Sons v. United Furniture Workers, CIO, 95 F. Supp. 851 (S. D.N.Y. 1951).

11. International Union, Furniture Workers v. Colonial Hardwood Flooring Co., 168 F.2d 33 (4th Cir. 1948); Ludlow Mfg. & Sales Co. v. Textile Workers Union, CIO, 108 F. Supp. 45 (D. Del. 1952); Matson Nav. Co. v. National Union of Marine Cooks, 22 L.R.R.M. 2138 (N.D. Cal. 1948).

12. "(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

"(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets." 61 STAT. 156 (1947), 29 U.S.C. § 185 (1952).

tive bargaining contracts. Some courts adopted the view that it merely gave federal district courts jurisdiction over disputes involving labor organizations in industries affecting commerce, without regard to the amount in dispute or to the diversity of citizenship.[13] This view would seem to say that section 301 simply creates a forum in the absence of diversity jurisdiction[14] but does not give the federal courts any power different from or additional to that which a state court would have if the action had been brought there.[15] The majority view held that section 301 not only granted the federal courts jurisdiction over cases involving such disputes, but also authorized such courts to establish a body of federal substantive law and to apply it to the enforcement of collective bargaining provisions.[16] Included in this body of federal law is specific performance of promises to arbitrate grievances under collective bargaining agreements.[17] The Court in the instant case adopts the majority view that contracts to arbitrate future disputes may be specifically enforced under section 301. Justices Burton and Harlan concurred that federal courts could grant specific performance in such cases by virtue of inherent equity power but did not feel that section 301 authorized the development of federal substantive law. In

13. United Steelworkers, CIO v. Galland-Henning Mfg. Co., 241 F.2d 323 (7th Cir. 1957); International Ladies' Garment Workers' Union, AFL v. Jay-Ann Co., 228 F.2d 632 (5th Cir. 1956) (*semble*); Paterson Parchment Paper Co. v. International Brotherhood of Paper Makers, AFL, 191 F.2d 252 (3d Cir. 1951); Mercury Oil Refining Co. v. Oil Workers Union, CIO, 187 F.2d 980 (10th Cir. 1951); Insurance Agents' Int'l Union, AFL v. Prudential Ins. Co., 122 F. Supp. 869 (E.D. Pa. 1954); Boeing Airplaine Co. v. Aeronautical Industrial Dist. Lodge 751, Int'l Ass'n of Machinists, 91 F. Supp. 596 (W.D. Wash. 1950), *aff'd*, 188 F.2d 356 (9th Cir. 1951).

14. United Steelworkers, CIO v. Galland-Henning Mfg. Co., *supra* note 13.

15. Mercury Oil Refining Co. v. Oil Workers Union, CIO, 187 F.2d 980 (10th Cir. 1951).

16. Signal-Stat. Corp. v. Local 475, United Elec. Workers, 235 F.2d 298 (2d Cir. 1956); Rock Drilling Union v. Mason & Hanger Co., 217 F.2d 687 (2d Cir. 1954); Association of Westinghouse Salaried Employees v. Westinghouse Elec. Corp., 210 F.2d 623 (3d Cir. 1954), *aff'd on other grounds*, 348 U.S. 437 (1955); Milk & Ice Cream Drivers Union, AFL v. Gillespie Milk Products Corp., 203 F.2d 650 (6th Cir. 1953); United Elec. Workers v. Oliver Corp., 205 F.2d 376 (8th Cir. 1953); Textile Workers Union, CIO v. Arista Mills Co., 193 F.2d 529 (4th Cir. 1951); Hamilton Foundry & Mach. Co. v. International Moulders Union, 193 F.2d 209 (6th Cir. 1951); AFL v. Western Union Tel. Co., 179 F.2d 535 (6th Cir. 1950); Shirley-Herman Co. v. International Hod Carriers, 182 F.2d 806 (2d Cir. 1950); Schatte v. International Alliance of Theatrical Stage Employees, 182 F.2d 158 (9th Cir. 1950); Bakery Workers v. National Biscuit Co., 177 F.2d 684 (3d Cir. 1949); United Automobile Workers, CIO v. Buffalo-Springfield Roller Co., 131 F. Supp. 667 (S.D. Ohio 1954); Food & Service Trades Council v. Retail Associates, Inc., 115 F. Supp. 221 (N.D. Ohio 1953); International Longshoreman's Union v. Libby, McNeill & Libby, 114 F. Supp. 249 (D. Hawaii 1953); Ludlow Mfg. & Sales Co. v. Textile Workers Union, CIO, 108 F. Supp. 45 (D. Del. 1952); Pepper & Potter, Inc. v. Local 997, United Auto Workers, CIO, 103 F. Supp. 684 (S.D.N.Y. 1952); Textile Workers Union, CIO v. Aleo Mfg. Co., 94 F. Supp. 626 (M.D.N.C. 1950); Wilson & Co. v. United Packinghouse Workers, 83 F. Supp. 162 (S.D.N.Y. 1949); Colonial Hardwood Flooring Co. v. United Furniture Workers, CIO, 76 F. Supp. 493 (D. Md.), *aff'd* 168 F.2d 33 (4th Cir. 1948).

17. Textile Workers Union, CIO v. American Thread Co., 113 F. Supp. 137 (D. Mass. 1953).

his dissent, Mr. Justice Frankfurter went to some length to set forth the views he expressed in *Association of Westinghouse Salaried Employees v. Westinghouse Elec. Corp.*[18] His view is that section 301 is purely procedural and that therefore no substantive law or additional modes of relief could be derived from it.[19]

The once unenforceable collective bargaining provision to arbitrate future disputes is now enforceable. However, there remain the problems of developing the substantive law to be applied[20] and of determining the relationship of federal and state courts in applying this law. Yet, it would seem that this decision reaches a desirable result in spite of the uncertainties remaining. A badly needed addition to the power of federal courts to enforce agreements to arbitrate future disputes has been realized and confusing and conflicting views as to the state of existing law have been clarified.

LABOR LAW—UNFAIR LABOR PRACTICE—EMPLOYER LOCKOUT TO PRESERVE MULTI-EMPLOYER BARGAINING BASIS

An employer association of eight linen supply firms was negotiating with respondent union, bargaining representative of the truck driver employees of the association members, for a new contract when the union called a strike[1] against one of the association members. The other members retaliated with a temporary lockout and notified the union that employees would be recalled when the strike was called off. Negotiations continued, and when a new contract was signed, the lockout and strike ended. The union then filed an unfair labor practice charge with the NLRB charging the other seven members of the association with violation of the Labor Management Relations Act of 1947.[2] The NLRB found that the lockout was justifiable against

18. 348 U.S. 437 (1955).

19. For an extensive discussion of the problems and conflicts involved prior to this decision, see Mendelsohn, *Enforceability of Arbitration Agreements Under Taft-Hartley Section 301,* 66 YALE L. J. 167 (1956).

20. "The range of judicial inventiveness will be determined by the nature of the problem. . . . Federal interpretation of the federal law will govern, not state law. . . . But state law, if compatible with the purpose of § 301, may be resorted to in order to find the rule that will best effectuate the federal policy. . . . Any state law applied, however, will be absorbed as federal law and will not be an independent source of private rights." Instant case, 353 U.S. at 457.

1. Striking against the members of a multi-employer bargaining group one at a time is commonly referred to as "whipsawing" or a "whip-saw strike." NLRB v. Truck Drivers Local 449, Int'l Brotherhood of Teamsters, AFL, 353 U.S. 87, 90 n.7 (1957).

2. 61 STAT. 136, 29 U.S.C. §§ 141-97 (1952). The union charged interference with rights under section 7, thereby violating sections 8(a)(1) and (3) of

a threat of strike action, such threat per se constituting an economic problem which could be defended against by a temporary lockout.[3] The court of appeals reversed[4] and a writ of certiorari was granted by the Supreme Court.[5] *Held,* reversed. A temporary lockout to preserve a multi-employer bargaining basis against the threat of a "whip-saw strike" is not an unfair labor practice under the Labor Management Relations Act of 1947. *NLRB v. Truck Drivers Local 449, Int'l Brotherhood of Teamsters, AFL,* 353 U.S. 87 (1957).

Employer lockouts[6] had been divided into two types by the Board prior to 1952, under both the Wagner Act[7] and the Taft-Hartley Act.[8] Those justified by the existence of an independent economic motive were upheld,[9] while those merely discriminating in employment to discourage membership in a labor organization were struck down.[10]

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the Act. Section 7 provides: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ." 61 STAT. 140 (1947), 29 U.S.C. § 157 (1952). Section 8(a) provides: "It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7. . . . (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." 61 STAT. 140 (1947), 29 U.S.C. § 158(a) (1) (3) (1952).

3. Buffalo Linen Supply Co., 109 N.L.R.B. 447 (1954).

4. Truck Drivers Local 449, Int'l Brotherhood of Teamsters, AFL v. NLRB, 231 F.2d 110 (2d Cir. 1956).

5. NLRB v. Truck Drivers Local 449, Int'l Brotherhood of Teamsters, AFL, 352 U.S. 818 (1956).

6. The meaning of the term lockout has not been uniform. There is no statutory definition of the term. It has been defined by judicial decisions as the cessation by the employer of the furnishing of work to employees in an effort to gain for the employer more desirable terms. Iron Molders' Union v. Allis-Chalmers Co., 166 Fed. 45 (7th Cir. 1908) (concurring opinion). The NLRB has not defined the term and its decisions reflect a wide diversity in concept of its meaning. See, *e.g.,* International Shoe Co., 93 N.L.R.B. 907 (1951) (cessation of operations due to inefficient operation caused by a strike in one department); Duluth Bottling Ass'n, 48 N.L.R.B. 1335 (1943) (closedown to avoid property loss); Lengel-Fencil Co., 8 N.L.R.B. 988 (1938) (a shutdown by employer in a fit of anger during an argument with a union representative without any intent to interfere with union activity); Hopwood Retinning Co., 4 N.L.R.B. 922 (1938) (mass discharges in reprisal for union activity). In Morand Bros. Beverage Co. v. NLRB, 190 F.2d 576 (7th Cir. 1951), the court used the term lockout synonymously with layoff, suspension and temporary severance, and distinguished it from discharge and permanent severance.

7. National Labor Relations Act, 49 STAT. 449 (1935), 29 U.S.C. §§ 151-66 (1952) (popularly known as the Wagner Act).

8. Labor Management Relations Act of 1947, 61 STAT. 136, 29 U.S.C. §§ 141-97 (1952), (popularly known as the Taft-Hartley Act).

9. Betts Cadillac Olds., Inc., 96 N.L.R.B. 268 (1951) (operational difficulties may have arisen by an unannounced work stoppage); International Shoe Co., 93 N.L.R.B. 907 (1951) (work stoppage in one department on a production line); Duluth Bottling Ass'n, 48 N.L.R.B. 1335 (1943) (spoilage of materials); See also Meltzer, *Single-Employer and Multi-Employer Lockout Under the Taft-Hartley Act,* 24 U. CHI. L. REV. 70 (1956); Koretz, *Legality of the Lockout,* 4 SYRACUSE L. REV. 251 (1953).

10. The L. B. Hosiery Co., 88 N.L.R.B. 1000 (1950); Augusta Chemical Co., 83 N.L.R.B. 53 (1949); D. H. Holmes Co., 81 N.L.R.B. 753 (1949); Scott Paper

In 1952, the Board was confronted directly for the first time with the question of whether an employer could use the lockout or unit layoff as a means of economic pressure in collective bargaining and concluded that it was an unfair labor practice.[11] In several subsequent decisions, the Board maintained the position that only independent business or economic reasons could justify a lockout.[12] However, several courts of appeals denied enforcement of such Board orders, feeling that employer lockouts could be used as a counterbalance against employee strikes.[13]

In the instant case the Board had reversed its earlier position and sanctioned the defensive lockout as applied to multi-employer units.[14] The court of appeals, in reversing the decision, had reasoned that the Board usurped congressional power to legislate when it sanctioned the multi-employer bargaining unit. The Supreme Court, in reversing the decision of the court of appeals, rejected this reasoning, pointing out that multi-employer bargaining units had long antedated the Wagner Act and that although attempts had been made to include limitations on such organizations during the debates leading to passage of the

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Box Co., 81 N.L.R.B. 535 (1949); Quest-Shon Mark Brassiere Co., 80 N.L.R.B. 1149 (1948); Piedmont Cotton Mills, 79 N.L.R.B. 1218 (1948); Sifers Candy Co., 75 N.L.R.B. 296 (1947).

11. Davis Furniture Co., 100 N.L.R.B. 1016 (1952); Morand Bros. Beverage Co., 99 N.L.R.B. 1448 (1952). It should be pointed out that despite the decisions of the Board there has been a widespread assumption in the labor relations field that the lockout was correlated to a strike. A contract signed in February, 1937, between General Motors Corp. and the United Auto Workers, CIO, contained the following provision: "The union and the employer agree that there shall be no *strike* or *lockout* without first using all possible means of peaceful settlement of any controversy which might arise." (Emphasis added.) Such a provision is still standard procedure in union employer contracts today. UNION CONTRACT CLAUSES, ¶ 51,701.14 (CCH 1957), has the following model provision for labor contracts: "Employees represented by the Union shall not engage in any strike, sitdown, slowdown, or work stoppage during the life of this Agreement; nor will the Company engage in any lockout during the life of this Agreement." Other government agencies which are or have been involved in labor problems have taken a similar attitude. The War Labor Board of 1918 in its statement of policy said there should be no strikes or lockouts during the war. This was carried forward to the National War Labor Board of 1942. In the labor-employer agreement preceding the appointment of that Board it was agreed that there would be no strikes or lockouts. This attitude was reflected in Exec. Order No. 9017, 7 FED. REG. 237 (1942), establishing the National War Labor Board. "Whereas, as a result of a conference of representatives of labor and industry which met at the call of the President on December 17, 1941, it has been agreed that for the duration of the war there shall be no strikes or lockouts, and that all labor disputes shall be settled by peaceful means, and that a National War Labor Board be established for the peaceful adjustment of such disputes." See also TAYLOR, GOVERNMENT REGULATION OF INDUSTRIAL RELATIONS (1948).

12. Diaper Jean Mfg. Co., 109 N.L.R.B. 1045 (1954); Valley Steel Products Co., 111 N.L.R.B. 1338 (1955).

13. Leonard v. NLRB, 205 F.2d 355 (9th Cir. 1953); Morand Bros. Beverage Co. v. NLRB, 190 F.2d 576 (7th Cir. 1951). See also NLRB v. Spaulding Avery Lumber Co., 220 F.2d 673 (8th Cir. 1955) (dictum); NLRB v. Continental Baking Co., 221 F.2d 427 (8th Cir. 1955) (dictum).

14. Buffalo Linen Supply Co., 109 N.L.R.B. 447 (1954).

Taft-Hartley Act, such proposals had failed of enactment. Agreeing with the position of the Board, the Court held that non-struck members of a multi-employer bargaining group could, without violating the Taft-Hartley Act, lock out their employees to preserve the effectiveness of the multi-employer bargaining basis. Although the Court did not directly answer the question of whether this right to lockout is a corollary of the employee's statutory right to strike, it did note that the protection of the right to strike by the Taft-Hartley Act is not so absolute as to deny self-help to employers where legitimate interests collide.

The decision in the instant case upheld the present position of the Board to balance conflicting interests by permitting members of a multi-employer association to temporarily lockout employees in order to preserve the group bargaining basis. There is no determination in the instant case that the employer lockout is correlative of the union's right to strike, but such a pronouncement would not mean too much as both are in fact limited by Taft-Hartley. There is no absolute right to strike, of course, and the Taft-Hartley Act regulates strikes, forbidding some as violations of the law. On the other hand there are undoubtedly other permissible uses of the lockout. It may be that in the future a lockout will be held to be an unfair labor practice only in those cases where it is used to frustrate organizational efforts, to destroy bargaining representation or to avoid the duty to bargain.

MILITARY LAW—JURISDICTION OF COURTS-MARTIAL—TRIAL OF OFFENSES COMMITTED DURING PREVIOUS ENLISTMENT OF ACCUSED

The army enlistment of Sergeant James C. Gallagher expired while he was a prisoner of war[1] of the Chinese Communists in Korea. Upon return in a prisoner exchange he was honorably discharged and re-enlisted[2] for three years. Two years later Gallagher was convicted by a general court-martial[3] of murder committed while a prisoner of

1. While Gallagher was a prisoner, Congress adopted the Uniform Code of Military Justice, 10 U.S.C. §§ 801-940 (Supp. IV, 1957) (hereinafter referred to as UCMJ). This resulted in charges against Gallagher for offenses arising under the Articles of War and also under the UCMJ.

2. Gallagher was discharged because of expiration of enlistment and processed in accord with Army Reg. 615-360, 24 June 1953. He was discharged on October 27, 1953 and re-enlisted at 9:00 the following morning.

3. Trials occurring after May 31, 1951, although of offenses against the Articles of War and committed prior to the adoption of the UCMJ, were conducted under the procedure prescribed by the UCMJ. MANUAL FOR COURTS MARTIAL UNITED STATES ix (1951).

war.[4] The defense contended that military jurisdiction over prior enlistment offenses ceases on discharge and is not revived by re-entry into service. The conflict resolved into a determination of whether jurisdiction was lost by discharge or preserved by UCMJ article 3(a).[5] The Army Board of Review, believing that article 3(a) had been held unconstitutional, ruled that jurisdiction was lost.[6] On appeal, *held,* reversed. Article 3(a) is constitutional when applied so as to preserve jurisdiction over discharged servicemen who have re-enlisted. *United States v. Gallagher,* 7 U.S.C.M.A. 506, 22 C.M.R. 296 (1957).

Military law finds its constitutional authority in the express power of Congress to make rules for the government and regulation of the land and naval forces.[7] Its authority[8] exists independently from the judicial power of the United States conferred by article three of the Constitution.[9] Courts-martial, therefore, are exclusively creatures of Congress,[10] and their jurisdiction[11] cannot be extended beyond those limits which Congress has fixed by statute.[12] The individual service-

4. Gallagher was convicted of two offenses of unpremeditated murder under former Article of War 92 (41 STAT. 805) now UCMJ art. 118, 10 U.S.C. § 918 (Supp. IV, 1957); three offenses of mistreatment of fellow prisoners of war and one offense of collaboration with the enemy under former Article of War 96 (41 STAT. 806) now UCMJ art. 105, 10 U.S.C. § 905 (Supp. IV, 1957); and one offense of misconduct as a prisoner of war under USMJ art. 105, 10 U.S.C. 905 (Supp. IV, 1957). He was sentenced to a dishonorable discharge, total forfeitures of pay and allowances and life imprisonment.

5. 10 U.S.C. § 803 (Supp. IV, 1957) (art. 3): "(a) Subject to section 843 of this title (article 43), no person charged with having committed, while in a status in which he was subject to this chapter, an offense against this chapter, punishable by confinement for five years or more and for which the person cannot be tried in the courts of the United States or of a State, a Territory, or the District of Columbia, may be relieved from amenability to trial by court-martial by reason of the termination of that status."

6. United States v. Gallagher, 21 C.M.R. 435 (1956). This court believed that a hiatus occurred in the accused's service at the moment of discharge and that he then had a free choice either to accept re-enlistment or retain his discharge status.

7. U.S. CONST. art. I, § 8, cl. 14. See Johnson v. Sayre, 158 U.S. 109 (1895); People *ex rel.* Garling v. Van Allen, 55 N.Y. 31, 35 (1873) ("Courts-martial were instituted for the trial of naval and military offences, and existed as early as the reign of James II, and probably had their origin in the ancient Court of Chivalry. They are regarded as a necessity in every civilized government, in order to properly discipline the military forces, by punishing offences therein.").

8. See Dynes v. Hoover, 61 U.S. (20 How.) 65 (1857) (Congress is authorized to subject persons actually in the armed services to trial by court-martial for military and naval offenses); United States v. Mackenzie, 30 Fed. Cas. 1160, No. 18,313 (S.D.N.Y.).

9. U.S. CONST. art. III.

10. *Ex parte* Wilson, 33 F.2d 214 (E.D. Va. 1929). See also Rose *ex rel.* Carter v. Roberts, 99 Fed. 948 (2d Cir. 1900); United States v. Mackenzie, 30 Fed. Cas. 1160, No. 18,313 (S.D.N.Y.).

11. The jurisdiction of a court-martial is based upon three indispensable requisites: (1) the court must be appointed by an official empowered to appoint it; (2) the membership must be in accordance with the law with respect to number and competency to sit on the court; (3) the court must be invested by act of Congress with power to try the person and the offense charged. MANUAL FOR COURTS-MARTIAL UNITED STATES 14, para. 8 (1951).

12. United States *ex rel.* Hirshberg v. Cooke, 336 U.S. 210 (1949); Dynes v.

man is subject to military law only by virtue of his military status.[13] Military status and court-martial jurisdiction are co-existent and are co-terminous upon discharge.[14] Termination of such status traditionally has barred military prosecution for offenses committed prior to discharge[15] even where the serviceman immediately re-enlists.[16] This practice remained untrammeled until 1950 when Congress provided that military jurisdiction over certain offenses would no longer be extinguished by termination of military status.[17]

A literal and fair interpretation of article 3(a) would appear to reinstate court-martial jurisdiction over countless numbers of discharged servicemen, including both civilians and those who re-enlisted, for trial of offenses which previously had been barred by a termination of military status. The Supreme Court in *Toth v. Quarles*[18] declared this act unconstitutional[19] when used to extend military jurisdiction[20] over civilians for offenses committed while they were in service as it

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Hoover, 61 U.S. (20 How.) 65 (1857); *Ex parte* Wilson, 33 F.2d 214 (E.D. Va. 1929); United States v. Mackenzie, 30 Fed. Cas. 1160, No. 18,313 (S.D.N.Y.). An act of Congress granting jurisdiction to a court-martial must be strictly conformed to. Runkle v. United States, 122 U.S. 543 (1887). For a judicial limitation on Congress' power to confer court-martial authority see *Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866).

13. Billings v. Truesdell, 321 U.S. 542 (1944); Givens v. Zerbst, 255 U.S. 11 (1921); *In re* Grimley, 137 U.S. 147 (1890); *In re* Morrissey, 137 U.S. 157 (1890). This emphasis on status was developed in the congressional debate on the original counterpart of Article of War 92. "A man's liability to punishment by a court-martial must necessarily depend on his status, that is, whether he is in the military forces . . . or whether he is not . . . ." CONG. GLOBE, 37th Cong., 3d Sess. 952 (1863).

14. Mosher v. Hunter, 143 F.2d 745 (10th Cir. 1944); *Ex parte* Drainer, 65 F. Supp. 410 (N.D. Cal. 1946).

15. Toth v. Quarles, 350 U.S. 11 (1955); *Ex parte* Drainer, 65 F. Supp. 410 (N.D. Cal. 1946); United States *ex rel.* Santantonio v. Warden, 265 Fed. 787 (E.D.N.Y. 1919); United States v. Lucas, 19 C.M.R. 613 (1955); United States v. Pitts, 14 C.M.R. 522 (1953); United States v. Santiago, 1 C.M.R. 365 (1951). Under certain circumstances court-martial jurisdiction has been upheld even after discharge: Kahn v. Anderson, 255 U.S. 1 (1921); Mosher v. Hunter, 143 F.2d 745 (10th Cir. 1944); United States *ex rel.* Marino v. Hildreth, 61 F. Supp. 667 (E.D.N.Y. 1945); Terry v. United States, 2 F. Supp. 962 (W. D. Wash. 1933); *In re* Craig, 70 Fed. 969 (D. Kan. 1895) (former servicemen serving sentence imposed by court-martial); Barrett v. Hopkins, 7 Fed. 312 (D. Kan. 1881) (expiration of enlistment after arrest but before trial); *In re* Bogart, 3 Fed. Cas. 796, No. 1596 (D. Cal. 1873) (fraud on the government); United States v. Simms, 20 C.M.R. 720 (1955) (discharge on foreign soil); United States v. Solinsky, 2 U.S.C.M.A. 153, 7 C.M.R. 29 (1953); United States v. Isidore, 7 C.M.R. 595 (1952) (discharge for convenience of the government).

16. United States *ex rel.* Hirshberg v. Cooke, 336 U.S. 210 (1949); United States v. Lucas, 19 C.M.R. 613 (1955).

17. See note 5 *supra.*

18. 350 U.S. 11 (1955).

19. This does not mean that Congress cannot provide a means for trial of ex-servicemen for offenses committed while in service but only that such means must be in accord with that power conferred upon Congress by article III of the Constitution.

20. See *Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866); *Ex parte* Lisk, 145 Fed. 860 (E.D. Va. 1906) (ordinarily citizens of the United States, not in military service, are not subject to the jurisdiction of a military court).

would deprive them of trial by jury[21] and other basic safeguards[22] guaranteed to them by the bill of rights. The question of constitutionality of the statute when used to preserve jurisdiction over servicemen for previous enlistment offenses was solved, temporarily at least,[23] by the instant decision. The court declared article 3(a) constitutional when applied to an accused who was a serviceman at the time of the offense and at the time of trial.[24]

It is certain that article 3(a) was enacted to prevent a re-occurrence of the demoralizing result[25] of *Hirshberg v. Cooke*.[26] It is unquestioned that the morale and discipline of the service would be disrupted by allowing traitorous or criminal offenders to overcome justice on a technicality[27] and continue to serve as a member of the military community. But the emotions of legislative government must not run rampant in barricading escape routes which men like Hirshberg and Gallagher have made detestable. The necessity for promoting the success of the military must not be allowed to infringe on those rights which Americans have fought to protect throughout our existence.

21. U.S. CONST. amend. VI. For a discussion of the principles underlying the right of trial by jury see Dimick v. Schiedt, 293 U.S. 474, 485-86 (1935); Patton v. United States, 281 U.S. 276, 312 (1930); People v. Garbutt, 17 Mich. 9, 97 Am. Dec. 162 (1868); STRYKER, FOR THE DEFENSE c. 10 (1947). For cases which influenced the founders of our government to protect the right of trial by jury see Dean of St. Asaph's Case, 21 How. St. Tr. 847 (Eng. 1783); Penn and Mead's Case, 6 How. St. Tr. 951. (Eng. 1670) (after trial the jurors were fined for acquitting Penn contrary to the court's instructions. One was imprisoned for not paying the fine, but the Court of Common Pleas released him in a habeas corpus proceeding, upholding the freedom of the jury to decide the case. Bushell's Case, 6 How. St. Tr. 999 (Eng. 1670)).

22. "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . ." U.S. CONST. amend. V. "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ." U. S. CONST. amend. VI.

23. In proceedings for habeas corpus a court can consider only whether the military tribunal had jurisdiction to act in the case under consideration. Hiatt v. Brown, 339 U.S. 103 (1950); Givens v. Zerbst, 255 U.S. 11 (1921); Swaim v. United States, 165 U.S. 553 (1897).

24. One question which remains unanswered is the effect which the length of separation from the service will have upon the revival of jurisdiction. What will happen if a discharged offender is recalled into service many years after the offense? There is broad language in the instant case which would indicate that jurisdiction will be revived no matter how long the separation.

25. See Toth v. Quarles, 350 U.S. 11, 23 (1955) (dissent); *Hearings Before the House Armed Services Committee on H.R. 2498*, 81st Cong., 1st Sess., at 1262 (1950):

"Mr. Smart: (reading article 3a) . . . Now, that will get the Hirshberg case where he reenlisted. It would get Hirshberg even though he had not reenlisted.

"Mr. Brooks. That will close up that loophole?

"Mr. Smart. In my opinion it will, sir.

"Mr. Brooks. What is your opinion?

"Mr. Elston. I am inclined to feel it would.

"Mr. Brooks. All right, if there is no objection, then, we will adopt that language."

26. 336 U.S. 210 (1949).

27. The cutting off of court-martial jurisdiction by discharge at the expiration of a term of enlistment.

The decision in *Toth v. Quarles* justly curtailed the broad sweep of this act by re-opening a path for those who no longer have a connection with the military. In the instant case the Court of Military Appeals, acting in accord with legislative intent, affirmed the conviction of a professional soldier and in so doing violated no rights afforded to the military by the Constitution.[28]

MUNICIPAL CORPORATIONS—SOVEREIGN IMMUNITY—TORT LIABILITY ARISING FROM PERFORMANCE OF GOVERNMENTAL FUNCTION

Plaintiff's husband died of smoke suffocation as a result of a fire which broke out in the municipal jail in which he was incarcerated. In a wrongful death action against the municipality, plaintiff alleged that her husband's death resulted from the negligence of a police officer in leaving the jail unattended and the prisoner unprotected against the fire. On appeal from an order sustaining the municipality's motion to dismiss the complaint, *held,* reversed. Under the doctrine of respondeat superior, a municipality is liable in a wrongful death action for the negligence of a police officer. *Hargrove v. Town of Cocoa Beach,* 96 So. 2d 130 (Fla. 1957).

The municipal corporation is often said to be a dual personality.[1] Courts generally recognize that a distinction exists between acts and duties which are private or proprietary and those which are public or governmental.[2] Tests to determine the classification of the municipality's functions vary,[3] but usually the operation is classified as

28. See SNEDEKER, MILITARY JUSTICE UNDER THE UNIFORM CODE c. 20 (1953). These rights, according to General Snedeker, are: the right to be informed of the nature and cause of the accusation; the right to have the assistance of counsel; the right to a speedy trial; the right to be confronted with the witnesses against him; the right to have compulsory process for obtaining witnesses in his favor (U.S. CONST. amend. VI); protection against compulsory self-incrimination; due process of law; protection against double jeopardy (U.S. CONST. amend. V); protection against unreasonable searches and seizures (U.S. CONST. amend. IV); prohibition of cruel and unusual punishments and excessive fines (U.S. CONST. amend. VIII); and other rights retained by the people and not delegated to the federal government (U.S. CONST. amend. IX).

1. Repko, *American Legal Commentary on the Doctrines of Municipal Tort Liability,* 9 LAW & CONTEMP. PROB. 214 (1942). The case of Bailey v. The Mayor of New York, 3 Hill 531 (N.Y. 1842) is said to be source of the concept of the bifurcation of the municipal entity.

2. 38 AM. JUR., *Municipal Corporations* § 572 (1941).

3. Some of the more important tests for determining sovereign functions are enumerated in Note, 1 BROOKLYN L. REV. 85, 88 (1932): "The municipality acts in a governmental capacity

"I. When it performs a duty imposed by the legislature of the state.

"II. Only when such imposed duty is one the state may perform and which pertains to the administration of government.

proprietary whenever the profit element is present.[4] It is usually held that while acting in its private capacity, a municipality is liable for negligence to the same extent as a private corporation or individual.[5] The obvious reasoning behind this rule is that it is not the duty of a municipal corporation to engage in a purely business or commercial enterprise.[6] On the other hand, the rule almost universally recognized is that absent some statutory provision,[7] there can be no recovery against a municipal corporation[8] for injuries resulting from

"III. When the municipality acts for the public benefit generally, as distinguished from acting for its immediate benefit and its private good.

"IV. When the act performed is legislative or discretionary as distinguished from ministerial."

4. Libby v. Portland, 105 Me. 370, 74 Atl. 805 (1909); Foss v. Lansing, 237 Mich. 633, 212 N.W. 952 (1927).

5. Splinter v. Nampa, 70 Idaho 287, 215 P.2d 999 (1950) (granting of permits by city to place structures in, under, on, or about streets and alleys is exercise of a proprietary, not a governmental function); Krantz v. Hutchinson, 165 Kan. 449, 196 P.2d 227 (1948) (recovery from city for property damage resulting from dike constructed by city officials more than five miles from city limits); Stein v. Newark, 25 N.J. Misc. 170, 52 A.2d 66 (Cir. Ct. 1947) (city furnishing water to private consumers acted in a private business capacity); Oklahoma City v. Haggard, 170 Okla. 473, 41 P.2d 109 (1935) (garage operated by city for motor vehicles used by police department is considered a proprietary function); See Green v. Amarillo, 244 S.W. 241 (Tex. Civ. App. 1922) (operation of a street railway system by city is private function); Hoggard v. Richmond, 172 Va. 145, 200 S.E. 610 (1939) (operation of swimming pool by municipality held to be business); Seaman v. Big Horn Canal Ass'n, 29 Wyo. 391, 213 Pac. 938 (1923) (municipality that supplies the inhabitants with water does so in its proprietary or business capacity).

6. "It is no part of its duty, as a municipal corporation, to engage in a purely business or commercial enterprise. When it seeks and obtains from the Legislature permission to engage in such an enterprise, its act in so doing is purely voluntary on its part . . . . It is then engaged in an ordinary business enterprise, and is bound by all the rules of law and procedure applicable to any other private corporation or person engaged in a like enterprise." Henry v. Lincoln, 93 Neb. 331, 140 N.W. 664, 665-66 (1913).

7. See, *e.g.*, N.Y. CT. CL. ACT § 8: "The state hereby waives its immunity from liability and action and hereby assumes liability and consents to have the same determined in accordance with the same rules of law as applied to actions in the supreme court against individuals or corporations, provided the claimant complies with the limitations of this article." "New York is probably the most liberal state in the union as to governmental tort liability. . . . Since New York has thus made itself and all its agencies and political subdivisions, including counties and municipalities generally liable for torts and since the court of claims is a court of record with appeal permitted to the appellate division and ultimately to the court of appeals the number of reported opinions in suits against the state, its agencies, or subdivisions (suable in regular courts) far exceeds those from any other state." Leflar and Kantrowitz, *Tort Liability of the States*, 29 N.Y.U.L. REV. 1363, 1391 (1954). For a complete summary and classification of tort liability of the states and their subdivisions, see Leflar and Kantrowitz, *supra*.

8. Russell v. Men of Devon, 2 T.R. 667, 100 Eng. Rep. 359 (1788) marks the beginning of the application of the principle of sovereign immunity to the smaller governmental units. It is important to note that a distinction is made between municipal corporations proper and quasi-municipal corporations, the general rule being that the latter are not liable in tort unless a statute so provides. While the *Men of Devon* case is often distinguished where a municipal corporation is involved, it may still be applicable to the quasi-municipal corporation. See generally Borchard, *Government Liability in Tort*, 34 YALE L.J. 1, 41-45 (1924); 3 VAND. L. REV. 835 (1950).

performance of its governmental functions.[9] Underlying this doctrine exempting the municipal corporation from private action for torts is the basic reasoning that the municipal corporation's undertakings which are governmental in nature are not for the promotion of the private interests of the municipality, but rather for public benefit.[10]

According to judicial decisions, the municipality in managing its jails is exercising a purely governmental function,[11] and is not liable for injuries caused by police officers in the performance of such function.[12] Refusing to follow the general rule, the court in the instant case recedes from its former position[13] concerning a municipal corporation's immunity when sued for the torts of police officers under the doctrine of respondeat superior. In reasoning to its conclusion, the court denounces the idea of immunization in the exercise of governmental functions as being anachronistic to our system of justice and to our traditional concepts of democratic government.[14] The court's decision is also based on its disapproval of the theory that the individual should suffer a grievous wrong in preference to imposing liability on the citizenry vicariously through their government.[15] In answer to the argument that stare decisis was being ignored, the court merely presents the thought that "judicial consistency loses its virtue when it is degraded by the vice of injustice."[16] Actually the court feels that it is restoring the original concepts announced by the Florida Supreme Court in 1850,[17] when the *Men of Devon*[18] decision was distinguished on the proposition that the action there was against

9. See Flait v. Mayor & Council, 48 Del. (9 Terry) 89, 97 A.2d 545 (1953) (furnishing fire protection for city is governmental function); Ahrend v. Kansas City, 173 Kan. 26, 243 P.2d 1031 (1952) (city not liable for negligence of its employees engaged in repairing streets); Hinds v. Hannibal, 212 S.W.2d 401 (Mo. 1948) (municipality not liable for assault by policeman of person in its jail).

10. 18 McQUILLIN, MUNICIPAL CORPORATIONS § 53.24 (3d ed. 1950).

11. See Oppenheimer v. Los Angeles, 104 Cal. App. 2d 545, 232 P.2d 26 (1951); Brown v. City of Craig, 350 Mo. 836, 168 S.W.2d 1080 (1943); Gurley v. Brown, 65 Nev. 245, 193 P.2d 693 (1948); Wittenbrook v. Columbus, 35 N.E.2d 980 (Ohio App. 1941); 18 McQUILLIN, MUNICIPAL CORPORATIONS § 53.94 (3d ed. 1950).

12. See Archer v. City of Austel, 68 Ga. App. 493, 23 S.E.2d 512 (1942) (no liability for death of prisoner by suffocation proximately caused by marshal's leaving him without proper ventilation); Gentry v. Town of Hot Springs, 227 N.C. 665, 44 S.E.2d 85, *aff'd*, 227 N.C. 668, 44 S.E.2d 87 (1947) (city not liable for death of one who suffocated in fire when jail was left unattended by police officers who previously had assaulted prisoner); 18 McQUILLIN, MUNICIPAL CORPORATIONS §§ 53.80, 53.94 (3d ed. 1950).

13. Brownlee v. Orlando, 157 Fla. 524, 26 So.2d 504 (1946); Kennedy v. Daytona Beach, 132 Fla. 675, 182 So. 228 (1938); Brown v. Town of Eustis, 92 Fla. 931, 110 So. 873 (1926).

14. See Leflar and Kantrowitz, *supra* note 7, at 1363-64 n.6.

15. See 38 AM. JUR., *Municipal Corporations* § 573 (1941).

16. 96 So. 2d at 133.

17. Tallahassee v. Fortune, 3 Fla. 19 (1850).

18. See note 8 *supra*.

all of the people of an unincorporated community having no corporate fund.[19]

This direct attack on the present general rule is considerably more encouraging than previous whittlings which have only resulted in confusion[20] and incongruities.[21] The instant decision leads one to believe that future Florida decisions will ignore the governmental-proprietary distinction. The practical solution to the problem could very well be the use of liability insurance both as a substitute for and a supplement to governmental liability.[22] Since tort liability is a normal risk involved in the conduct of any activity, it seems feasible that insurance against the risk would be an effective step in the direction of eradicating the injustices which result from the application of the theory that the sovereign is immune from tort liabilities arising from performance of its governmental functions.

19. "[H]aving no corporate fund, and no legal means of obtaining one, each corporator would be liable to satisfy any judgment rendered against the corporation. . . . But in regular corporations, which have, or are supposed to have, a corporate fund, this reason does not apply." Tallahassee v. Fortune, 3 Fla. 19, 24 (1850).

20. *Compare* Mocha v. Cedar Rapids, 204 Iowa 51, 214 N.W. 587 (1927) (operation of swimming pool is governmental function), *with* Hoggard v. City of Richmond, 172 Va. 145, 200 S.E. 610 (1939) (operation of swimming pool is proprietary function); Mayor & Alderman v. Jordon, 142 Ga. 409, 83 S.E. 109 (1914) (sweeping streets is governmental function), *with* Louisville v. Hans, 167 Ky. 160, 180 S.W. 65 (1915) (liability for failure to remove garbage can from sidewalk); Keller v. Los Angeles, 179 Cal. 605, 178 Pac. 505 (1919) (operation of public park is governmental function), *with* Warden v. City of Grafton, 99 W. Va. 249, 128 S.E. 375 (1925) (maintenance of public park is corporate function); Fox v. Philadelphia, 208 Pa. 127, 57 Atl. 356 (1904) (liability for negligence of elevator operator in city hall), *with* Howard v. New Orleans, 159 La. 443, 105 So. 443 (1925) (operating elevator for criminal court building is governmental function).

21. Miami v. Bethel, 65 So. 2d 34 (Fla. 1953) (immunity from responsibility for assault by police officer); Brownlee v. Orlando, 157 Fla. 524, 26 So. 2d 504 (1946) (municipality not liable for jailor's assault of prisoner who subsequently died as a result); Avon Park v. Giddens, 158 Fla. 130, 27 So. 2d 825 (1946) (liability to injured citizen for negligence of police officer who was driving an automobile); McCain v. Andrews, 139 Fla. 391, 190 So. 616 (1939) (city not liable for alleged malicious prosecution by police officer); Lewis v. Miami, 127 Fla. 426, 173 So. 150 (1937) (liability to prisoner who contracted communicable disease while in city jail); Ballard v. Tampa, 124 Fla. 457, 168 So. 654 (1936) (liability for negligence of police officer in permitting injury of prisoner working on public streets); Kaufman v. Tallahassee, 84 Fla. 634, 94 So. 697 (1922) (liability for negligent operation of a fire truck).

22. See Leflar and Kantrowitz, *supra* note 7, at 1413-15.

STATE AND LOCAL TAXATION—DUE PROCESS AND COMMERCE CLAUSE LIMITATIONS—STATE TAX ON FOREIGN CORPORATION'S NET INCOME FROM LEASE OF PROPERTY TO BE USED EXCLUSIVELY IN INTERSTATE COMMERCE

The taxpayer, a corporation doing no business in Arkansas and having no property there, leased freight cars to railroad companies in Utah. In the course of the lessee's use, these cars passed through Arkansas, making no stops for loading or unloading. Arkansas imposed a tax[1] on the taxpayer's net income derived from the lease, apportioned to the mileage the cars traveled through the state. The taxpayer paid the tax under protest and brought suit for refund, alleging violation of the commerce and due process clauses of the Federal Constitution. On appeal from a judgment for the taxpayer, *held,* reversed. Where a foreign corporation, pursuant to a contract executed outside the taxing state, leases railroad rolling stock for use in purely interstate commerce, a state tax on that portion of the income which is attributable to the lessee's use of the rolling stock within the taxing state does not violate the commerce clause or the due process clause of the Federal Constitution. *Commissioner of Revenues v. Pacific Fruit Express Co.,* 296 S.W.2d 676 (Ark. 1956).

The constitutionality of a state tax levied upon a multistate business may be subject to challenge on two grounds: the commerce clause, which limits a state's right to interfere with the free flow of interstate commerce,[2] and the due process clause, which prohibits a tax upon an activity not having sufficient contact with the taxing jurisdiction. For purposes of the commerce clause, a distinction is made between a gross receipts and a net income tax, the latter being considered more favorably.[3] A gross receipts tax on a multistate business,

1. ARK. STAT. ANN. § 84-2003 (1947). The statute provides for a tax on income of Arkansas property of non-residents, whether or not the non-residents are qualified to do business in the state and whether or not the business is conducted in interstate commerce, with the amount of the tax based on net income properly allocated as net income arising from ownership of property within the state.

2. Various tests have been applied by the Supreme Court from time to time to determine the scope of the commerce clause. For a brief discussion of the tests, see HARTMAN, STATE TAXATION OF INTERSTATE COMMERCE 21-48 (1953). See also Barrett, *State Taxation of Interstate Commerce—"Direct Burdens," "Multiple Burdens," or What Have You?,* 4 VAND. L. REV. 496 (1951).

3. "A tax upon gross receipts affects each transaction in proportion to its magnitude and irrespective of whether it is profitable or otherwise. Conceivably it may be sufficient to make the difference between profit and loss, or to so diminish the profit as to impede or discourage the conduct of commerce. A tax upon the net profits has not the same deterrent effect, since it does not arise at all unless a gain is shown over and above expenses and losses, and the tax cannot be heavy unless the profits are large. Such a tax, when imposed upon net income from whatever source arising, is but a

whether engaged solely in interstate commerce or in both intra- and interstate business, is invalid unless it is so apportioned as to reach only those receipts derived from intrastate commerce.[4] When levied on net income, however, a tax on a business engaged in both intra- and interstate commerce has been upheld even though applied to the total net income from both, as this is said merely to place an "indirect and incidental" burden on interstate commerce.[5] Where the business is purely interstate, the courts seem to distinguish between a tax *levied on* the net income itself as the subject, which was assumed until recently to be valid,[6] and a tax on the privilege of doing interstate business *measured by* the same net income, which has fallen categorically before the commerce clause.[7] Whether a tax levied directly on the net income from a business that is exclusively interstate violates the commerce clause has been the topic of copious comment,[8] centering around the Supreme Court decisions in *Memphis Natural Gas Co. v. Beeler*[9] and *Spector Motor Service, Inc. v. O'Connor*.[10] In the *Beeler* case, Chief Justice Stone, speaking for the Court, stated that a tax on the net income of an exclusively interstate business was not prohibited by the commerce clause.[11] In the *Spector* case, which held invalid a privilege tax measured by net income from

method of distributing the cost of government, like a tax upon property . . . ." United States Glue Co. v. Oak Creek, 247 U.S. 321, 329 (1918).

4. This is true even when the tax is imposed upon a local activity and properly allocated. Joseph v. Carter & Weekes Stevedoring Co., 330 U.S. 422 (1947); Meyers v. Wells, Fargo & Co., 223 U.S. 298 (1912).

5. United States Glue Co. v. Oak Creek, 247 U.S. 321 (1918). For a vivid explanation of this rule, see the dissent in Spector Motor Service, Inc. v. O'Connor, 340 U.S. 602, 610 (1951).

6. This assumption apparently stems from the fact that when a privilege tax measured by net income was levied on an exclusively interstate business, the Supreme Court, in declaring the tax invalid, would emphasize the privilege as being the objectionable incident of the tax. This apparently was the basis of Mr. Justice Stone's statement in Memphis Natural Gas Co. v. Beeler, 315 U.S. 649, 656 (1942), that a tax not on the privilege of conducting the business, but on the income itself would be valid. This assumption appeared to be further settled in West Publishing Co. v. McColgan, 27 Cal. 2d 705, 166 P.2d 861, *aff'd per curiam*, 328 U.S. 823 (1946), when the Supreme Court upheld a tax statute construed by the California Supreme Court to include a tax on the net income of an exclusively interstate business. There was no opinion given in that decision, however, and opponents of this tax are quick to point out that there is a possible ground for distinguishing that case as involving some intrastate commerce.

7. Spector Motor Service, Inc. v. O'Connor, 340 U.S. 602 (1951). See Barrett, *"Substance" vs. "Form" in the Application of the Commerce Clauses To State Taxation*, 101 U. PA. L. REV. 740, 780-84 (1953). This distinction evidences the fact that following a particular statutory ritual may be more important constitutionally than the economic consequences of the tax.

8. *Compare* Cox, *Interstate Commerce and a State's Right to Revenue*, 30 TAXES 25 (1952) (which would hold the tax valid), *with* Clark, *Interstate Commerce and a State's Right to Revenue: a Rejoinder*, 30 TAXES 263 (1952); Marsh, *Interstate Commerce: State Taxation of Motor Carriers*, 41 A.B.A.J. 603 (1955) (the latter writers would hold the tax invalid).

9. 315 U.S. 649 (1942).

10. 340 U.S. 602 (1951).

11. 315 U.S. at 656.

a business that was solely interstate, a footnote by the Court suggested that Justice Stone's statement was not essential to the decision of the *Beeler* case.[12] The *Spector* declaration has been interpreted by some legal writers as abrogating the distinction between taxes imposed *on* net income and privilege taxes *measured by* net income, and thus placing a commerce clause condemnation on both kinds of taxes.[13]

The Arkansas court in the instant case adopts the *Beeler* view and permits the tax to stand. The Supreme Court of Pennsylvania recently held a similar tax unconstitutional because, although labeled a property tax, the levy in effect taxed the privilege of carrying on interstate commerce.[14] In reaching this result, the court apparently followed the inference to be drawn from the *Spector* case that a tax on net income violates the commerce clause. In a third case involving almost identical facts, the Kentucky Supreme Court avoided the question by interpreting their statute as not authorizing such a tax.[15] That court held that income derived from a lease made outside the state had its source outside the state; therefore the tax had "no relation to a subject within the taxing jurisdiction."[16]

Use of the due process clause as a means of invalidating a state taxing statute has occurred with increasing frequency in recent years. A state may not, in reaching for a source of revenue, impose a tax on a subject which results in taxation of extraterritorial values.[17] The basic test used to determine a state's "jurisdiction to tax" appears to be whether the tax in practical operation has relation to the opportunities, benefits or protection conferred or afforded by the taxing state sufficient to justify its imposition.[18] The general rule is that a state has jurisdiction to levy a property tax on any tangible property located within its boundaries although the taxpayer is an out-of-state corporation.[19] This rule has been applied to uphold a state property

12. 340 U.S. at 609 n.6.

13. Proponents of this view maintain that the Supreme Court, in criticizing the statement made in the *Beeler* case, was laying the groundwork for invalidating such a tax. They point out that there is a ground for distinguishing West Publishing Co. v. McColgan, 27 Cal. 2d 705, 166 P.2d 861, *aff'd per curiam*, 328 U.S. 823 (1946), as involving some intrastate commerce and the fact that the court did not cite the *West* case in the *Spector* decision. See Marsh, *supra* note 8.

14. Roy Stone Transfer Corp. v. Messner, 377 Pa. 234, 103 A.2d 700 (1954).

15. Kentucky Tax Comm'n v. American Refrigerator Transit Co., 294 S.W.2d 555 (Ky. 1956).

16. *Id.* at 556.

17. "[N]o state may tax anything not within her jurisdiction without violating the Fourteenth Amendment." Farmers Loan & Trust Co. v. Minnesota, 280 U.S. 204, 210 (1930). See Interstate Oil Pipe Line Co. v. Stone, 337 U.S. 662, 667-68 (1949); McLeod v. J.E. Dilworth Co., 322 U.S. 327 (1944).

18. See Union Refrigerator Transit Co. v. Kentucky, 199 U.S. 194 (1905).

19. See generally Bittker, *The Taxation of Out-of-State Tangible Property*, 56 YALE L.J. 641 (1947) and articles cited therein. For a brief discussion of the limitations, see HARTMAN, STATE TAXATION OF INTERSTATE COMMERCE 13-20 (1953).

tax on rolling stock moving entirely in interstate commerce so long as the tax is fairly apportioned to the length of time spent or the number of miles traveled within the taxing state.[20]

In the instant case Arkansas clearly could have imposed an ad valorem tax on the taxpayer's property.[21] Although the reasoning is not clear, the court held that the income tax did not violate the due process clause. It would seem that if there is sufficient connection with the state to justify the imposition of a property tax on the out-of-state lessor's interest in the property, an income tax should likewise be constitutional unless the taxes are so inherently different that the state has insufficient interest in the res to impose an income tax. A possible distinction might lie in the fact that a property tax is based on the state's immediate protection and domain over the physical property, whereas an income tax is imposed upon one's right to derive gain from the property employed within the state. Furthermore, if the lease contract, rather than the leased property, was regarded as the source of the income, then, since the lease was made outside the state, the state might have no power to tax the income.[22] While the due process objections as applied to a situation such as the instant case are as yet unexplored, it would seem that the taxing state should be given considerable latitude in choosing the precise manner of the tax as long as it is affording in return the requisite protection to the taxpayer.

The Supreme Court has never directly determined the constitutionality of a tax of the type involved in the instant case. Whether such a tax would be struck down on commerce clause objections would depend upon whether the *Beeler* or the *Spector* view of the effect of a tax on net income appealed to a majority of the new Court. Since the *Spector* case, in which the Court divided six to three, four new Justices have been appointed. If a majority could not agree that this tax violated the commerce clause, there might yet be sufficient grounds upon which a majority could agree that the connection between the taxing state and the subject of the tax is insufficient to satisfy due process.

20. Johnson Oil Refining Co. v. Oklahoma, 290 U.S. 158 (1933); American Refrigerator Transit Co. v. Hall, 174 U.S. 70 (1899). While the vehicles may be taxed, it is equally clear that the freight may not be taxed. Hughes Brothers Timber Co. v. Minnesota, 272 U.S. 469 (1926); Case of the State Freight Tax, 82 U.S. (15 Wall.) 232 (1872).

21. American Refrigerator Transit Co. v. Hall, 174 U.S. 70 (1899).

22. See note 15 *supra*.